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92-78

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioner,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLTON R. DEVAULT, Jr.
Counsel of Record
102 Broad Street
Kingsport, TN 37660
(615) 246-3601

JOHN S. MCLELLAN, III
P.O. Box 509
Blountville, TN 37617
(615) 323-6481

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. In a county jail inmate toothbrush assault case against the county and its jail policy-makers, the District Court's charge included an automatic liability Fourteenth Amendment "liberty interest" due process instruction disjunctively with an inadequate Eighth Amendment "deliberate indifference" charge. After the entry judgment on the jury verdict in favor of the plaintiff inmate on his federal claims, the Court found in favor of the plaintiff on his pendent state law claims against the same defendants. The Sixth Circuit Court of Appeals reversed the District Court on the grounds that the Fourteenth Amendment charge was too brief and that the charge should allow the jury to consider the type and extent of any due process which should have been afforded the inmate when he was "incorrectly" classified at the county jail. The issues with regard to the § 1983 due process theory and proposed jury charge are:

A. Do the provisions of the Eighth Amendment subsume the "liberty interests" an inmate alleges were created by the jail's classification procedures and cellblock assignment and require that the Eighth Amendment's "deliberate indifference" standard of culpability govern all of the inmate's *42 U.S.C. § 1983* claims?

B. Does the language of the jail policy and procedure manual regarding cellblock assignments create a viable § 1983 due process claim that the inmate was incorrectly classified?

C. Is the extent of the constitutional due process which must be afforded an inmate during or after his jail

QUESTIONS PRESENTED FOR REVIEW – Continued

classification and cellblock assignment for the court or a jury to determine?

D. Does the existence of state law post-deprivation remedies and the fact that the assaulted inmate was awarded damages on his pendent state law claims against the defendant policy-makers, preclude the use of the Fourteenth Amendment liberty interest theory and proposed jury charge formulated by the Sixth Circuit?

II. The District Court dismissed the respondent's Eighth Amendment claims against the individual jailers who were on duty the evening that the toothbrush incident occurred on the grounds that they could not have known that the assault was likely to occur and that there was no proof that they had been deliberately indifferent. The Sixth Circuit affirmed that dismissal. Both the District Court and the Court of Appeals refused to dismiss the inmate's Eighth Amendment claims against the county and its jail policy-makers. The issues with regard to the inmate's Eighth Amendment claims are:

A. This Court's holding in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) requires that the inmate's Eighth Amendment claims against the county and its official policy-makers also be dismissed.

B. If an Eighth Amendment inmate assault claim against municipal policy-makers is to be tried before a jury, the Court's instructions should not allow the jury to find in favor of the plaintiff on the grounds that (1) several former inmates testified they were "afraid" during the time they were incarcerated at the jail, or (2)

QUESTIONS PRESENTED FOR REVIEW – Continued

because the court and jury had the benefit of evaluating the inmate's "mental condition" in light of expert psychiatric testimony which was developed after the assault but was not available to any of the Sullivan County jailers or its policy-makers during the time of the inmate's incarceration, or (3) because the Court announced in the charge that the plaintiff had "borderline intelligence."

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Sullivan County, Tennessee, Sheriff Mike Gardner, and Jail Captain Lynn Hawkins were defendants originally named by the respondent at the time of the filing of his complaint in this case.

Deputy Sheriff Lynch and Deputy Sheriff Murph were also original party defendants in the District Court proceedings, prior to the Court's granting their motions for a directed verdict. They were appellees in the proceedings before the United States Court of Appeals for the Sixth Circuit.

The defendants Lon Boyd, Keith Westmoreland, and Deputy Sheriff Conner were defendants in the District Court proceedings prior to the Court's dismissing the respondent's claims against them. Although named in the caption of the case, Boyd, Westmoreland, and Conner were not parties to the proceedings before the United States Court of Appeals for the Sixth Circuit.

Tyrone Ross, a former jail inmate whose name also appears in the caption of the case as defendant, did not appear as a party defendant in the District Court proceedings and was not a party in the proceedings before the United States Court of Appeals for the Sixth Circuit.

Sheriff's Deputies Baker, Peterson, and Waterson were never made party defendants in the District Court proceedings. They, along with Sheriff Deputies Lynch and Murph, filed an appellee's brief in opposition to the plaintiff's attempt to have them added as party defendants in the Sixth Circuit proceedings.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *John Doe v. Sullivan County, Tennessee, Mike Gardner, Lynn Hawkins, Lon V. Boyd; Keith Westmoreland, Deputy Sheriff Murph; Deputy Sheriff Conner; Deputy Sheriff Lynch; and Tyrone Ross*, No. 90-5288: 90-5346: 90-5348, is published at 956 F.2d 545 (6th Cir. 1992). A copy of the opinion is reproduced in the Appendix to this petition at App 1. The judgment of the United States Court of Appeals for the Sixth Circuit is reproduced at App. 33.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 10, 1992. On April 30, 1992, Justice John Paul Stevens signed an order extending the time for filing this petition for certiorari to and including July 9, 1992. This Court's jurisdiction is invoked pursuant to the provisions of 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. *Title 42 U.S.C. § 1983*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia.

STATEMENT OF THE CASE

The plaintiff John Doe, hereinafter referred to as the plaintiff or inmate, was assaulted by having a toothbrush

partially inserted in his anus in the early morning hours of October 1, 1986, while he was incarcerated in the county jail for Sullivan County, Tennessee, on a misdemeanor conviction. After plaintiff's release from custody, he filed a *Title 42 U.S.C. § 1983* action alleging that his Fourteenth and Eighth Amendment constitutional rights had been violated. The plaintiff invoked the jurisdictional provisions of *28 U.S.C. § 1343* and included pendent state law claims in his civil rights complaint. The Court granted the plaintiff's motion to allow him to proceed under the pseudonym "John Doe."

With respect to the defendant jailers the plaintiff alleged:

> (5) Defendants Lynch, Murph, and Conner failed to properly classify plaintiff, to segregate him, to request additional assistance of jail personnel as needed, to periodically make security checks, and to properly guard plaintiff or provide proper surveillance.[1]

The plaintiff further alleged that the aforesaid acts of the jailers constituted the customs and policies of the county and its jail policy-makers.

Defendants Boyd and Westmoreland were the former and then current elected County Executives, and were dismissed from the case at the close of the plaintiff's proof. Deputy Sheriff Conner was also dismissed with the concurrence of the plaintiff since he was not stationed in the jail on the evening of the alleged assault. The Court

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[1] This summary of the civil rights allegations is quoted directly from the District Court's Final Pretrial Order which supplanted the pleadings, App. 39.

also dismissed the plaintiff's claims that certain "jail conditions" such as insufficient lighting, inadequate surveillance, and overcrowding caused the toothbrush incident.

Significantly, the District Court granted the motions for a directed verdict made by deputies Lynch and Murph, who had removed a suddenly ill inmate from the plaintiff's cellblock at about the time that fellow inmate Tyrone Ross stuck a toothbrush partially into the plaintiff's anus. The Court found at App. 44:

> . . . . As against the remaining deputies [Lynch and Murph] under plaintiff's Section 1983 claim, the Court finds no evidence was adduced showing that the deputies either knew or should have known that an assault on the plaintiff was highly foreseeable. Moreover, the Court finds that plaintiff failed to produce evidence of conduct by these individuals sufficient for a reasonable fact finder to find deliberate indifference. Furthermore, the record lacks any evidence on which a reasonable factfinder could conclude that conduct by the deputies proximately caused plaintiff to be harmed. Because this evidence of proximate cause is essential to all of plaintiff's claims against the deputies, the Court concludes that a reasonable factfinder could find only for these defendants and against plaintiff. Consequently, the Court GRANTS the motion for directed verdict made on behalf of Deputy Sheriffs Murph and Lynch.

The Court submitted the issues of the § 1983 liability of Sheriff Gardner, Jail Superintendent Hawkins and Sullivan County, as policy-makers, to the jury on a Fourteenth Amendment due process deprivation theory and an Eighth Amendment deliberate indifference theory. The

jury was instructed to assess damages if found in favor of the plaintiff on either theory of liability [Tr. 932]. The jury returned a verdict in favor of the plaintiff and against each of the defendants and awarded the plaintiff one hundred thousand dollars ($100,000.00) in damages. The Court later entered an order finding in favor of the plaintiff on his pendent state law claims but merged the forty thousand dollar ($40,000.00) judgment into the civil rights damage award since the state law claims arose out of the same set of circumstances.

In its written order memorializing the Court's oral announcement of the various directed verdicts, entered three days after the jury verdict had been returned in favor of the plaintiff, the District Court differentiated the plaintiff's Eighth Amendment claim that he was "improperly" classified at the county jail from the heretofore unexpressed Fourteenth Amendment claim that the plaintiff was "denied" classification [App. 45].

After the District Court overruled their joint motions for a new trial or for a judgment notwithstanding the verdict, the defendants Sullivan County, Sheriff Mike Gardner, and Jail Superintendent Lynn Hawkins perfected an appeal to the Sixth Circuit Court of Appeals. The judgment and memorandum opinion of the Court of Appeals were entered on February 10, 1992 and the opinion is reported at 956 F.2d 545 (6th Cir. 1992). A copy of the opinion is included in the Appendix at pp. 1-33.

Even though the Sixth Circuit Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings, the opinion of

the appellate court, as more fully described in this petition, improperly expands the breadth of § 1983 liability for municipalities, sanctions the empowerment of local municipal officials to create protectible liberty interests, confuses that newly announced power with the established dimensions of municipality liability under § 1983, creates conflicts among the circuits with respect to the Eighth Amendment standards of culpability for local governmental policy-makers, and contravenes the express ruling of this Court in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). The Sixth Circuit's treatment of the plaintiff's state law claims is not involved in this petition except as the state law judgment [App. 47-49] reflects that the plaintiff did have adequate state law postdeprivation remedies available to him. He cannot recover damages under his procedural due process theory and is not entitled to a Fourteenth Amendment jury charge upon remand.

REASONS FOR GRANTING THE WRIT

A LOCAL JAIL'S WRITTEN CLASSIFICATION PROCEDURES CANNOT CREATE ADDITIONAL PROTECTED LIBERTY INTERESTS IN A CONVICTED INMATE TO BE FREE FROM AN ASSAULT WITH A TOOTHBRUSH WHEN THE INMATE IS ALREADY PROTECTED FROM CRUEL AND UNUSUAL PUNISHMENTS DURING INCARCERATION BY THE EIGHTH AMENDMENT.

The Sixth Circuit Court of Appeals has erroneously expanded the concept of state law created "liberty" interests recognized by this Court in several landmark

decisions including *Paul v. Davis*, 424 U.S. 693 (1976) and *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989) to encompass the operational directives contained in a local county sheriff's jail policy and procedure manual and has thereby widened the scope municipal liability in Title 42 U.S.C. § 1983 cases. The petitioners acknowledge that the Sheriff's jail policy and procedure manual could have been utilized to impose § 1983 liability on the defendants if the policy manual established an unconstitutional jail policy. But the manual does not set out any unconstitutional county policy and the plaintiff did not claim during the trial that any of the policies or procedures contained therein violated his constitutional rights.

This Court, in *Paul v. Davis*, 424 U.S. 693 (1976) cited prior precedent as it held at 424 U.S. 710:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Again, in *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), a state prison inmate transfer case, this Court reconfirmed that state law created liberty interests:

> These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion.

Additional Supreme Court decisions defining and limiting the Fourteenth Amendment rights of state prison inmates include *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Vitek v. Jones*, 445 U.S. 480, 489 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); and *Hudson v. Palmer*, 468 U.S. 517 (1984). None of these cases intimate that local jail officials can create cognizable liberty interests for jail inmates by publishing a jail operations manual.

Throughout its discussion of the District Court's challenged Fourteenth Amendment instructions [App. 21-22] the Sixth Circuit Court of Appeals refers to "state law" created "liberty interests" which are protected by the procedural due process component of the Fourteenth Amendment as if the county sheriff's jail policy manual is equivalent to prison regulations promulgated by the state itself. The record and applicable Tennessee law shows that such is not the case. The Tennessee Corrections Institute (T.C.I.), by virtue of authority conferred by *Tennessee Code Annotated § 41-4-140* [App. 50], is authorized to establish minimum standards for local jails. The T.C.I., in turn, publishes a Minimum Standards for Local Facilities manual which requires each local jail authority to maintain a written plan for prisoner classification [Exhibit No. 19, p.33]. The T.C.I.'s minimum standards do not specify the classification criteria or procedures to be utilized at any local jail but allow each local jail authority to determine its own classification criteria. The T.C.I. does require the "sight and sound separation" between males

and females and between adults and juveniles at every local jail. The T.C.I. has no authority to close a local jail in the event that the jail fails to conform to the agency's minimum standards.

Disregarding the dearth of state regulatory mandates, the Sixth Circuit emphasized the county jail manual's written instructions to the jail's booking officers regarding the criteria to be considered when an officer made a cellblock assignment [App. 25-28]. The court of appeals announced that the quoted sections of the manual created a "liberty" interest in "correct" inmate jail classification which is protected by the procedural due process component of the Fourteenth Amendment.

The Sixth Circuit also overlooked the permissive language of the classification section of the jail manual. The quoted portions of the manual speak in terms of " . . . factors to consider **might be** . . . ," and "[t]he facility will make **every reasonable effort** to provide separate housing. . . . " The jail's booking officers are required to use their best judgment and discretion and no particular classification or cellblock assignment is mandated.[2] The Sixth

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[2] The Sullivan County Jail in which the respondent was housed on two separate occasions in 1986 has since been replaced by a new, much larger, county facility. The jail consisted of eight separate cellblocks, none of which were interconnected. Each cellblock had a dayroom area and three separate sleeping areas known as "slams." Inmates in one cellblock were separated from inmates in the other cellblocks by solid concrete block walls and could not physically interact with inmates in any of the other cellblocks. During the late evening hours, inmates resting in the respective "slams" of the cellblock were also isolated from the other sleeping areas. The plaintiff and his assailant did not sleep in the same "slam."

Circuit's conclusion that the sheriff's published instructions to the booking officers (not "prison officials" as the Court states at App. 28) that they consider "**existing facility records**"[3] regarding an inmate's history of violent behavior, or of homosexuality, or of mental handicap somehow establishes a "protectible liberty interest" is contrary to the holding of this Court in *Kentucky Department of Corrections v. Thompson*, 490 U.S 454 (1989) and is at odds with the holdings of the other circuits. The Sixth Circuit ignores this Court's directive that "mandatory" language in state regulations must be relevant and must require that a particular result be reached once the substantive predicates have been met.

The jail's classification designation or cellblock assignment did not involve "goodtime" credits, administrative segregation, or other type of jail disciplinary action. Jail privileges were not affected by the cellblock assignment. The plaintiff's particular cellblock assignment was within the contemplation of his misdemeanor sentence.

The defendants Sullivan County, Sheriff Mike Gardner, and Jail Superintendent Lynn Hawkins insisted throughout the trial and subsequent appeal to the Sixth Circuit that the plaintiff's § 1983 claim against them that a cellmate stuck a toothbrush into his anus had to be governed by the "deliberate indifference" culpability standard of the Eighth Amendment. Any Fourteenth

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[3] The only "existing facility record" on the plaintiff was a jail card filled out during his prior March, 1986, incarceration. The jail did not have any records regarding the plaintiff's mental or emotional condition.

Amendment rights regarding the plaintiff's condition and treatment during incarceration, including his classification status, were subsumed by the more specific provisions of the Eighth Amendment after his conviction and sentencing. The Fourteenth Amendment protections, whether substantive or procedural became "redundant." *Whitely v. Albers*, 475 U.S. 312, 327 (1986); *Graham v. Conner*, 490 U.S. 386, 395-396 (1989). Since the District Court insisted on making a Fourteenth Amendment charge to the jury, the petitioners unsuccessfully requested that it be phrased in terms of the Eighth Amendment's deliberate indifference, or wantonness, standard of official culpability [Tr. 905].

The record shows that the jailer who initially assigned the plaintiff to cellblock #3 in the county jail had no reason to suspect that the plaintiff was in danger of physical or sexual assault there. The jail had no history of repeated acts of sexual assault. The plaintiff had been incarcerated at the jail for nine days earlier in the year on a separate misdemeanor charge without incident. Cellblock #3 held other young men whom the plaintiff knew personally. The general sessions court mittimus which ordered the Sheriff to incarcerate the plaintiff did not contain any notice to the Sheriff or his jailers that the plaintiff was suffering from any type of disability or that he required special attention or accommodation [Defendants' Ex. #3, Tr. 832]. The booking officer talked with and observed the plaintiff and did not believe that he would be in any type of danger [Tr. 669-676]. The jail nurse testified that when he saw the plaintiff inmate on several occasions during his September - October, 1986, incarceration he did not observe any indication that the

plaintiff was in danger of being assaulted [Tr. 718]. The jail card filled out by the booking officer shows that the he considered most of the relevant classification factors suggested by the sheriff's jail manual [Plaintiff's Ex. #13].

The Sixth Circuit's interpretation of due process requirements attendant upon a county jailor's classifying a misdemeanant inmate is at odds with numerous Supreme Court procedural due process rulings and represents an unacceptable deviation from this Court's repeated holdings that the day to day operation of a prison (or county jail) is best left to the discretion and experience of the jail administrators. *Hewitt v. Helms*, 459 U.S. 460, 471 (1983).

THE EXTENT OF ANY DUE PROCESS WHICH SHOULD HAVE ALLEGEDLY BEEN AFFORDED THE INMATE UNDER THE CIRCUMSTANCES IS FOR THE COURT, NOT THE JURY, TO DETERMINE.

Assuming the disputed relevance of a Fourteenth Amendment procedural due process charge to a § 1983 jail inmate assault case, the Sixth Circuit's holding overlooks the established requirement that whether adequate hearing procedures were provided prior to or after the "liberty interest" deprivation is a matter of constitutional law for the Court, not the jury, to decide. The District Court's original and erroneous Fourteenth Amendment jury instructions did not address this vital constitutional consideration. The Sixth Circuit states at App. 29-30:

> . . . . The instructions in the case at bar, we believe, fail to reflect this complexity. On the instructions given, the jury could have returned

> a verdict for plaintiff on the legally uninformed determination that defendants deprived plaintiff's liberty interests "arbitrarily" and "without due process of law." In making this determination, the jury was not asked to consider whether plaintiff's constitutional interest in adequate procedure was satisfied by postdeprivation state law remedies, or even whether a predeprivation hearing was a meaningful possibility under the circumstances. Given the extreme brevity of the charge, we believe it quite possible that the jury was confused or misled as to the basis for which it properly could have found defendants liable under the Fourteenth Amendment.

The appellate court's directive to the District Court to expand its "due process" instructions and allow a jury to determine the extent of due process which should have been afforded the plaintiff during or after the classification process, or even after the toothbrush assault, is contrary to the holding of this Court that such a determination is for the Court to make as a matter of law. *Vitek v. Jones*, 445 U.S. 480, 490 (1980). How a district court can satisfactorily instruct a jury as to the adequacy of "postdeprivation state law remedies" is not specified. The Sixth Circuit also omits the standard which the jury should employ in determining whether a "predeprivation hearing was a meaningful possibility." The defendants insist that these determinations, in an appropriate procedural due process case, must be made by the court and not a jury.

STATE LAW AFFORDED THE PLAINTIFF AN ADEQUATE POST-DEPRIVATION REMEDY FOR ANY ALLEGED DUE PROCESS VIOLATION AND THE COURT ENTERED A JUDGMENT IN FAVOR OF THE PLAINTIFF ON HIS PENDENT STATE LAW CLAIMS.

The Sixth Circuit opinion also overlooks the crucial fact that Tennessee state law afforded the plaintiff an adequate postdeprivation remedy for the loss of his alleged liberty interest in "correct classification." The plaintiff took advantage of those post-deprivation state law remedies when he included in his § 1983 action certain pendent state law claims for damages alleging that the petitioners violated specific state statutes.[4] In its post-trial order on the merits of the plaintiff's state law claims [App. 47], the District Court awarded the plaintiff $40,000.00 on these pendent state law claims and specifically found at App. 49:

> . . . . Plaintiff's **state law claims arise from the same incidents underlying his federal claim**. Furthermore, no evidence was adduced showing plaintiff's damages for his state law claim differed or were in addition to those for his federal claim.

By allowing the plaintiff to have two bites at the apple and recover damages for the same alleged due process deprivation under both state law and § 1983, the District Court and Court of Appeals have unacceptedly expanded § 1983 municipality liability. The Sixth Circuit's ruling is in direct conflict with this Court's express ruling

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[4] The plaintiff's state law claims against the various defendants are set out in the District Court's Final Pretrial Order at App. 38-39.

in *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) that the existence of adequate state postdeprivation remedies precludes any § 1983 due process claim.[5]

The Sixth Circuit's published deviation from *Hudson, supra*, must be reviewed and reversed to maintain consistency among the circuit courts of appeal in area of municipality civil rights liability. The Sixth Circuit's opinion which directs the District Court to formulate irrelevant and improper due process jury instructions, in spite of existing state remedies, will result in additional injustice. As published precedent, it will subject municipal jail officials to a potential procedural due process § 1983 action for damages every time an inmate believes that instructions published in a local jail manual have not been followed by the jailers.

The Sixth Circuit's empowerment of local officials and local governments to create protected "liberty" interests is a dramatic departure from established constitutional law. If the Sixth Circuit's decision is allowed to stand, the number of governmental entities which have recognized authority to create local "liberty" interests by the publication of various departmental policy and operational manuals could eventually be enlarged from the present fifty states to encompass hundreds of thousands of local governments and their respective elected and

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[5] That the degree of culpability for a Fourteenth Amendment due process deprivation claim may adversely impact state law claims included in an inmate's complaint does not alter the fact that the state law remedies exist and could have been made the basis of an independent action in the appropriate state court.

appointed officials. The department heads of various local governments will be creating their own "liberty" interests for the citizens with whom they deal each time that a departmental operations manual is published.

The established significance of a policy manual in the context of a municipality's exposure to § 1983 liability for unconstitutional policies is now in danger of being confused with concern that these same policy manuals may create local "liberty" interests which are protected by the procedural due process component of the Fourteenth Amendment. Such a perplexing situation is untenable. Title 42 U.S.C. § 1983 already provides an adequate remedy for any constitutional injury suffered by an individual as a result of a local government's unconstitutional policy. It is not necessary that the same local policy manual also be construed to create protectible "liberty" interests and foster additional § 1983 litigation. This Court's firm guidance is required. National uniformity, not national confusion, is required in the critical area of § 1983 municipal policy-making liability.

THIS COURT'S HOLDING IN *CITY OF LOS ANGELES V. HELLER*, 475 U.S. 796 (1986) MANDATES A DISMISSAL OF THE PLAINTIFF'S § 1983 CLAIMS AGAINST THE COUNTY AND ITS JAIL POLICY-MAKERS.

The District Court and the Sixth Circuit Court of Appeals ignored the holding of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), after both courts agreed that the record could not support any finding that sheriff's deputies, Lynch and Murph, who were on duty at the jail

during the time the toothbrush incident occurred, violated the plaintiff's constitutional rights. The Court's memorandum order shows that the basis of the deputies' dismissal was the absence of any proof tending to show there was any risk of assault upon the plaintiff, the absence of any proof of deliberate indifference on the jailers' part, and the absence of any proof of proximate cause between the jailers' actions and the toothbrush incident:

> . . . . As against the remaining deputies [Lynch and Murph] under plaintiff's Section 1983 claim, the Court finds no evidence was adduced showing that the deputies either knew or should have known that an assault on the plaintiff was highly foreseeable. Moreover, the Court finds that plaintiff failed to produce evidence of conduct by these individuals sufficient for a reasonable fact finder to find deliberate indifference.
>
> App. 44

The Sixth Circuit Court of Appeals affirmed the directed verdicts in favor of the two jail guards at App. 8. The appellate court quoted in detail the testimony of the plaintiff and his privately retained psychiatrist,[6] which confirmed that the plaintiff did not complain to any jail guards or supervisors that he was being harassed or assaulted by cellmate Tyrone Ross until after jailer Murph overheard the plaintiff tell his mother about the toothbrush incident during a weekly visitation period [App. 7-9]. The Court of Appeals, however, refused to follow

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[6] The Sixth Circuit incorrectly refers to Dr. I.N. Kutty, a private psychiatrist practicing in Sullivan County, Tennessee, who treated the respondent after his release from jail, as "the prison psychiatrist" [App. 8].

this Court's ruling in *Heller* and dismiss the case against the defendant policy-makers. The defendants insist since the individual jailers who were alleged to have violated the inmate's constitutional rights prior to and at the time of the toothbrush assault were found not to have been deliberately indifferent to the plaintiff's constitutional rights, then no Eighth Amendment constitutional deprivation occurred and the official policy-makers and the county cannot be liable. The facts of this case are completely compatible with the *Heller* rationale.

The Court's Final Pretrial Order, which supplanted the pleadings, summarized the plaintiff's claims against the individual jailers in the following paragraph:

> (5) Defendants Lynch, Murph, and Conner failed to properly classify plaintiff, to segregate him, to request additional assistance of jail personnel as needed, to periodically make security checks, and to properly guard plaintiff or provide proper surveillance.[7]
>
> Plaintiff further avers that each of the acts and failures to act were the policy or custom of the Sullivan County Jail,. . . .

The Sixth Circuit opinion avoided the holding of *Heller* by stating that the defense of qualified immunity precluded the application of the *Heller* logic to the defendant policy-makers [App. 15-17]. The error of the Sixth Circuit's rationale is that the defense of qualified immunity was not the basis of the District Court's directed

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[7] It is the individual jailers, not the defendant policy-makers, who were charged with misclassifying the plaintiff and eventually allowing him to be assaulted with a toothbrush.

verdicts in favor of the individual jailers. Nor was qualified immunity included among the appellate court's reasons for sustaining the directed verdicts in favor of the individual jailers. The "deliberate indifference" standard of liability in Eighth Amendment cases appears to negate any "good faith" immunity defense. If an individual defendant charged with deliberate indifference is exonerated by the Court after the plaintiff's proof, it must be because the plaintiff's proof failed to show acts of "deliberate indifference" to a constitutional right. Either there is sufficient proof of a constitutional deprivation or there is not. The good faith qualified immunity defense does not impact the objective elements of the "deliberate indifference" standard.

Petitioners Sheriff Mike Gardner and Jail Administrator Lynn Hawkins insist that if there was no evidence to show that the Sullivan County jailers should have known that an assault upon the plaintiff was highly foreseeable then they, as jail administrators and policy-makers,[8] certainly could not "know" that an inmate assault upon the plaintiff was highly foreseeable. As a matter of law and logic, the defendants cannot be deliberately indifferent to an unforeseen threat. This Court has recently made it clear in *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), that jail administrative officials must have a culpable state of mind and exhibit, at the very least, deliberate indifference to general prison conditions which deprive an inmate of food, warmth, or exercise before they can be liable for an

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[8] There was no evidence in the record that either Sheriff Gardner or Captain Hawkins personally knew the plaintiff or were aware of his particular situation in the jail.

Eighth Amendment violation in a "prison conditions" case. Similarly, proof of policy-makers' knowledge of a specific and real risk of harm to a jail inmate must be required before the policy-makers can be liable to the injured inmate.

Los Angeles v. Heller, 475 U.S. 796, 799 (1986) and *Seiter, supra*, make it clear that when there is no evidence of facts which would have put the jail guards on notice that an inmate was in imminent danger of an attack, then the jail's policy-makers, as a matter of law, could not have had any foreknowledge of the unusual attack, and could not have maintained a policy of deliberate indifference to it. The Sixth Circuit's published decision in this case is contrary to the recent express holdings of this Court, imposes almost automatic liability upon a county and its Sheriff for an unforeseen and unusual jailhouse sexual assault, and creates confusion in the various circuits over the interpretation of this Court's decisions in *Heller* and *Seiter*.

EIGHTH AMENDMENT JURY INSTRUCTIONS MUST FOCUS ON THE OBJECTIVE COMPONENTS OF THE DELIBERATE INDIFFERENCE STANDARD OF POLICY-MAKING CULPABILITY.

The Sixth Circuit Court of Appeals approved the erroneous Eighth Amendment jury instructions complained of by the defendants and thereby expanded the liability of local governments and their jail administrators beyond the dimensions set by this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976) and *Whitely v. Albers*, 475 U.S. 312 (1986) and *Canton v. Harris*, 489 U.S. 378 (1989).

The District Court's Eighth Amendment jury instructions [App. 19-20] unacceptably diffused this Court's more focused standards for policy-makers' liability under the Eighth Amendment and allowed the jury to award damages against the defendants without specifying what policy or custom was unconstitutional. The challenged instructions allowed the jury to find in favor of the plaintiff despite the lack of evidence of any known pattern of sexually-oriented assaults which could have put the jail policy-makers on notice that a substantial risk of such assaults existed in cellblock #3 of the Sullivan County jail and despite the lack of evidence that the plaintiff belonged to a class of inmates for whom the risk of sexually oriented attacks was a serious problem of substantial dimensions at the jail.[9]

The District Court encouraged the jury to find in favor of the plaintiff by charging the jury at Tr. 941:

> Now, among the things that you may consider in the plaintiff's evidence is evidence of his slight build, youthfulness and borderline intelligence. Of course, this list is not exhaustive and you may consider other evidence that you deem important to determine whether or not the plaintiff belonged in a class of individuals likely to be attacked.[10] .

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[9] The Sixth Circuit Court of Appeals overlooked the fact that inmates in other sections of the county jail did not have access to cellblock #3 and that the undisputed evidence showed that cellblock #3 was the best behaved cellblock in the jail.

[10] The Court of Appeals omitted this portion of the challenged charge from its quotation of the charge at App. 19.

Significantly, the District Court omitted any reference to the fact that there had not been any proof of sexually-oriented assaults on any "class" of inmates at the county jail. The defendants insist that this portion of the charge directed the jury to consider critical evidence which was not available to the Sullivan County jailers when the plaintiff was incarcerated, usurped the province of the jury by announcing what the Court considered the facts to be, and prejudiced the defendants. There was absolutely no evidence in the record that the jail staff knew that the plaintiff was "emotionally impaired."[11] The Court's Eighth Amendment jury charge gave the plaintiff the benefit of expert testimony and evidence developed after his release from jail and unfairly penalized the defendants.

Additionally, the Eighth Amendment charge allowed the jury to find that a pervasive risk of non-specific harm existed at the Sullivan County Jail if there were evidence that "inmates at the jail felt unsafe" [App. 19, Tr. 940]. Some of the plaintiff's former cellmates testified they felt unsafe during their incarceration while other inmates testified they did not feel threatened. The defendants insist that this Court's Eighth Amendment "deliberate indifference" standard of culpability cannot be satisfied by an inmate's subjective feelings. It is reasonable to assume that most rational individuals would "feel

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[11] Dr. I.N. Kutty, the plaintiff's treating psychiatrist, testified at Tr. 205 that the respondent was not mentally retarded but was "emotionally impaired." Dr. Kutty's diagnosis was made during the summer of 1988, nearly two years after the toothbrush incident occurred.

unsafe" if forced to spend several months incarcerated in a county jail or state penitentiary. Those subjective feelings must not be allowed to subject local jail policy-makers or a municipality to § 1983 liability for an Eighth Amendment violation. This Court has recently ruled that challenged prison conditions must be harsh enough to satisfy the objective component of the Eighth Amendment inquiry. *Wilson v. Seiter,* 111 S.Ct. 2321 (1991). The criteria for "pervasive inmate violence" in a jury charge should also satisfy the Eighth Amendment's "objective component."

The Sixth Circuit's opinion is but one of several recent circuit opinions which have blurred the focused and objective elements of Eighth Amendment official culpability announced by this Court. There is now confusion and conflict in the circuits as to what an inmate must prove in order to have jail or prison policy-making officials held liable for damages in a § 1983 inmate assault case, especially in cases where the individual police officers or jail guards are found not to have violated any of a plaintiff's constitutional rights. See *Apodaca v. Rio Arriba County Sheriff's Department,* 905 F.2d 1445, 1447 (10th Cir. 1990); *Williams v. Borough of West Chester, Pa.,* 891 F.2d 456, 467 (3d Cir. 1990); *Partridge v. Two Unknown Police Officers of Houston,* 791 F.2d 1182 (5th Cir. 1986); *Vosburg v. Solem,* 845 F.2d 763 (8th Cir. 1988); *Wilkes v. Young,* 897 F.2d 896 (7th Cir. 1990); and *Redman v. County of San Diego,* 896 F.2d 362 (9th Cir. 1990).

The Sixth Circuit refused to reverse the District Court's denial of the defendants' motions for judgment notwithstanding the verdict despite the written records and reliable testimony which showed that the defendant

Sheriff and Jail Superintendent maintained a policy of having the Sheriff's jailers respond immediately to any disturbance in any of the jail's separate cellblocks. The defendant policy-makers had issued standing orders for jailers to transfer inmates from one cellblock to another to preserve order and security in the various cellblocks [Tr. 676-678, 833-834]. Gordan Kampka, the plaintiff's correctional facilities expert witness, grudgingly testified that the Sullivan County jail log entries reflected that jailers responded immediately to inmate incidents or disturbances [Tr. 403] and that the jail log entries made by Jail Superintendent Hawkins in February, 1986, which ordered the jailers to refamiliarize themselves with the jail procedures, showed that he was alert to the jail operations and was taking steps to make certain the jail staff stayed informed regarding the jail policy manual [Tr. 412].

Norman Cox, the petitioner's expert witness testified that a review of the jail logs for the months of August and September, 1986, just prior to the toothbrush incident, revealed four (4) incidents of inmate violence per one hundred inmates at the county jail. Cox explained that six (6) to ten (10) incidents of violence per one hundred inmates each month should be considered excessive in a penal institution [Tr 623 - 632].[12] There were no reported incidents of inmate altercations in cellblock #3, which housed the plaintiff prior to the toothbrush incident. Significantly, the type of inmate altercations in other cellblocks which were recorded in the jail logs and referred

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[12] The Sixth Circuit omitted this explanation from its synopsis of Cox's testimony at App. 15.

to by the parties' experts were irregular episodes of fisticuffs, and pushing and shoving matches. There was no gang violence in the jail nor was there evidence of any pattern of inmate assaults with deadly weapons. Tennessee Corrections Institute inspection reports never mentioned any alleged pattern of inmate assaults. A 1986 jail conditions case, involving the same expert witness, Gordan Kampka, and one of the plaintiff's trial attorneys, did not allege or show that there was any pervasive pattern of inmate violence at the county jail [Defendants' Ex. #5a, 5b & 5c]. There simply was no pattern of any type of sexual assaults occurring in the Sullivan County Jail which should have put Hawkins and Gardner on notice that the plaintiff was in danger of being abused with a toothbrush.[13]

The Sixth Circuit's unsupported conclusion that the District Court's "policy" portions of the Fourteenth and Eighth Amendments jury charge were legally adequate is also contrary to this Court's holding in *Canton v. Harris*, 489 U.S. 378 at 390 that the municipal policy-makers must be deliberately indifferent to a known unconstitutional situation before § 1983 liability can attach. The defendants insisted in vain to the District Court and to Sixth Circuit Court of Appeals that in an inmate assault case a jury should be instructed, in substance, that the plaintiff inmate had to prove (1) that the municipality, through its jail policy-makers, maintained a policy or custom of allowing jail staff to be deliberately indifferent to the

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[13] There had not been any reported sexually-oriented assaults in the county jail during Captain Hawkins' tenure as jail superintendent [Tr. 830].

danger of an inmate assault when the jailers had **actual knowledge** of the **specific risk of harm** to the inmate or (2) that the defendants maintained a policy of deliberate indifference to the danger when the risk of sexually-oriented assault was so substantial or pervasive in the inmate's cellblock that knowledge on the part of the jailers and policy-makers could be inferred. By refusing to require the District Court to charge the jury with regard to the essential elements of an "unconstitutional policy" for § 1983 liability purposes, the Sixth Circuit has mixed elements of § 1983 "supervisory liability" with elements of § 1983 "policy-making" liability and drastically departed from this Court's municipal liability rulings in *Monell v. New York City Dept. of Social Service*, 436 U.S. 658 (1978), *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) and *Canton v. Harris*, 489 U.S. 378 (1989).

Since there was no failure to train issue involved in the trial of case, since there were no facts which should have put the county's jailers on notice of that the inmate would likely be the victim of a sexually-oriented assault, and since the individual jailers were not guilty of any deliberate indifference, the defendants could not have maintained any policy of deliberate indifference to the plaintiff's Eighth Amendment rights.[14]

The Sixth Circuit's blurring and diluting of this Court's "deliberate indifference" standard for § 1983

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[14] Defendant Hawkins regularly wrote orders regarding jail operations in the jail logs and insisted that the jailers continue to refamiliarize themselves with the various procedures. He suspended one jail sergeant for a serious departure from the jail's classification policy [Tr. 833].

municipal liability under either the Fourteenth or Eighth Amendment improperly subjects local governments and their chief administrators to the unacceptable risk of substantial damage awards in civil rights actions. A ruling by this Court which sets out the essential elements of municipal culpability for an Eighth Amendment inmate assault jury charge is necessary to establish a uniform standard of § 1983 liability for local governments which maintain and operate jails and workhouses. An emphatic decision by this Court will prevent the Sixth Circuit and other circuit courts of appeal from continuing to dilute the holding of *Whitely v. Albers,* 475 U.S. 312 (1986) and *Wilson v. Seiter,* 111 S.Ct. 2321 (1991). This Court was not afforded the proper opportunity to address the substantive elements of official Eighth Amendment culpability in an inmate assault case in *Smith v. Wade,* 461 U.S. 30 (1986). This case affords the Court the opportunity to announce a much needed and clearly defined standard which can be applied in all the circuits.

CONCLUSION

For the foregoing reasons, the petitioners, Sullivan County, Mike Gardner, and Lynn Hawkins, pray that this Court grant their petition and issue a writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,

CHARLTON R. DEVAULT, JR.
Counsel of Record
102 Broad Street
Kingsport, TN 37660
(615) 246-3601

JOHN S. MCLELLAN, III
P.O. Box 509
Blountville, TN 37617
(615) 323-6481

Attorneys for Petitioners

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5288/5346/5348

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOHN DOE, *Plaintiff-Appellee, Cross-Appellant* (90-5288/5348), *Appellant* (90-5346), *v.* SULLIVAN COUNTY, TENNESSEE; MIKE GARDNER; LYNN HAWKINS, *Defendants-Appellants, Cross-Appellees* (90-5288/5348), LON V. BOYD; KEITH WESTMORELAND; DEPUTY SHERIFF MURPH; DEPUTY SHERIFF CONNER; DEPUTY SHERIFF LYNCH; TYRONE ROSS, *Defendants.*	ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed February 10, 1992

Before: JONES and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge.*

JONES, Circuit Judge. Defendants Sullivan County, Mike Gardner, and Lynn Hawkins appeal a jury verdict in favor of plaintiff John Doe for injuries sustained while incarcerated. Plaintiff in turn appeals directed verdicts for the remaining defendants and pretrial orders limiting evidence and denying his motion to add new defendants. For the reasons that follow, we reverse and remand for further proceedings.

I

On September 6, 1986, plaintiff was arrested on third-degree burglary charges for the theft of comic books, pens, and a calculator The next day plaintiff was placed in the Sullivan County Jail ("Jail"). On September 11, 1987, plaintiff pled guilty to a misdemeanor and was sentenced to a six-month term of imprisonment at the Jail. At the time of his incarceration, plaintiff was nineteen years old, weighed 125 pounds, and suffered from "an obvious mental disability." J.A. at 15.

Plaintiff was placed in a cell with nine or ten other inmates from September 6 to October 10, 1986. During this period, inmate Tyrone Ross reportedly began harassing plaintiff. On October 1, as prison employees were removing another inmate from the cell, the remaining inmates were "slammed" together to separate them from

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* The Honorable Charles W. Joiner, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

the inmate being removed. While so separated, Ross sexually assaulted plaintiff by inserting a toothbrush into his anus. Ross was subsequently charged with and convicted of the attack.

Plaintiff filed this suit under 42 U.S.C. § 1983 on September 22, 1987. Named as defendants were: (1) Sullivan County, Tennessee; (2) Tyrone Ross; (3) Sheriff Mike Gardner, Superintendent of the Jail; (4) Keith Westmoreland, Jail Administrator prior to August 1986 and County Executive thereafter; (5) Lon V. Boyd, County Executive from 1980-86; (6) Chief Jailer Lynn Hawkins; (7) Deputy Sheriff Murph; (8) Deputy Sheriff Conner; and (9) Deputy Sheriff Lynch. The complaint alleged that the defendants were aware that the Jail's overcrowding created an unreasonable risk of inmate assaults, that the inmate classification system failed to separate inmates who had violent tendencies, and that the guards failed to adhere to a system of periodic security checks in violation of state law.

Shortly before trial, Sullivan County moved to disqualify plaintiff's counsel Everett Mechem because it wished to call him as a witness. The district court granted the motion on October 3, 1988, and this court subsequently denied plaintiff's motion for a writ of mandamus ordering the district court to vacate its order. *In re Mechem*, 880 F.2d 872, 875 (6th Cir. 1989). Mechem reentered the case after Sullivan County revealed Mechem would not be called as a witness. On May 19, 1989, the district court denied plaintiff's motion to add jailers Baker and Peters as defendants.

A jury trial began on September 20, 1989. At trial, prison expert Gordon Kamka testified that plaintiff should have been placed in protective custody while at the Jail due to his slight build and mental disability. Kamka conducted a risk assessment of the Jail and concluded that "there was a risk of harm for every inmate in that facility." J.A. at 502. His analysis of jail records and inmate interviews revealed a pattern of violence among inmates and infrequent security checks by guards. During trial, the court granted plaintiff's motion to dismiss Deputy Sheriff Conner. At the close of plaintiff's proof, the court granted the directed verdict motions of Deputy Sheriffs Murph and Lynch because "no evidence was adduced showing that the deputies either knew or should have known that an assault on the plaintiff was highly foreseeable." *Id.* at 83. In granting directed verdict motions in favor of former County Executive Lon Boyd and current County Executive Keith Westmoreland, the district court found "that no proof was adduced showing that either Mr. Boyd or Mr. Westmoreland committed any act against plaintiff or created any policy proximately causing harm to the plaintiff." *Id.* at 82-83. Finally, the court granted a directed verdict for all defendants on plaintiff's claim that inadequate lighting and overcrowding caused plaintiff's injuries.

At the close of evidence, the court instructed the jury to consider plaintiff's § 1983 claim under the Eighth and Fourteenth Amendments. On September 25, 1989, the jury returned a judgment against defendants Sullivan County, Gardner, and Hawkins and awarded plaintiff $100,000 in compensatory damages. The court awarded plaintiff an additional $40,000 on his state law claims against Sullivan

County; however, this amount was subsumed within the amount awarded on the federal claim. Defendants' motion for judgment notwithstanding the verdict or, alternatively, for a new trial was denied on October 24, 1989. This timely appeal followed.

Plaintiff on appeal challenges the directed verdicts, various rulings at trial, and the calculation of damages. Sullivan County, Gardner, and Hawkins appeal the denial of their directed verdict motion, the jury instructions, and the exclusion of Deputy Murph's testimony, as well as the state law judgment.

II

We first consider whether the court erred in directing a verdict against plaintiff on the claim that "systemic deficiencies" at the prison caused plaintiff's injuries in violation of the Eighth Amendment. In reviewing a district court's disposition of a motion for a directed verdict or for a judgment notwithstanding the verdict, we examine

> whether there was sufficient evidence to raise a material question of fact for the jury. . . . "[T]he trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made."

Frost v. Hawkins County Bd. of Educ., 851 F.2d 822, 826 (6th Cir.) (quoting *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978)), *cert. denied*, 488 U.S. 981 (1988).

The motion is properly granted where "there is 'either a complete absence of proof on the issues or no controverted issues of fact upon which reasonable men could differ.' " *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1419 (6th Cir. 1990) (quoting *Milstead v. International Bhd. of Teamsters*, 580 F.2d 232, 235 (6th Cir. 1978)), *cert. denied*, 112 S. Ct. 51, *and cert. denied*, 112 S. Ct. 274 (1991).

We have recently reaffirmed that

> the legal standard applicable to determining whether a violation of the eighth amendment occurred in the context of an assault upon an inmate is whether the defendants' conduct amounted to a 'deliberate indifference' to a risk of injury to the plaintiff. The Supreme Court in *Whitley [v. Albers]* concluded that in order to support an action under section 1983, plaintiffs must establish something more than lack of ordinary due care, inadvertence or error. Instead, the conduct must be 'obdurate' or 'wanton' *i.e.*, a recklessness or callous neglect. This standard is designed to strike an appropriate balance between the deference that should be accorded to prison officials in their administration of the prison and the constitutional right of prisoners to be free from cruel and unusual punishment.

Roland v. Johnson, 856 F.2d 764, 769 (6th Cir. 1988); *see also Wilson v. Seiter*, 111 S. Ct. 2321, 2327 (1991).

Plaintiff's evidence at trial indicated that (1) overcrowding at the Jail necessitated more staff to decrease the risk of violence, (2) the cells were dark, (3) more jailers were needed, (4) fourteen-day mental and physical

evaluations were not performed, and (5) security checks often were not performed every thirty minutes, as required by jail procedures. Plaintiff argues that, had these conditions not obtained, the assault would not have occurred.

Viewing this evidence, as we must, in a light most favorable to the plaintiff, we cannot conclude that these conditions caused the assault. As offensive as these conditions may have been, they do not support plaintiff's Eighth Amendment claim absent proof that they proximately caused his injury. While we recognize that proving causality in circumstances like these may prove difficult, we are nonetheless convinced that more is required than plaintiff's naked assertion that the assault would not have occurred but for the offensive conditions. To hold otherwise would effectively transform the causality requirement from a substantive element of proof into one of pleading. This we are unwilling to do. The district court found that plaintiff failed to produce any evidence showing a causal relationship between his injuries and the alleged overcrowding, insufficient lighting, or inadequate surveillance. After careful review of the record, we agree.

Plaintiff also argues that the district court erred in directing a verdict in favor of defendants Lynch and Murph on the claim that they were deliberately indifferent to his safety. The evidence against Lynch consisted exclusively of plaintiff's testimony that Lynch knew of the harassment:

> Q: Do you recall Officer Lynch and another deputy . . . asking you if, if anybody was bothering you or if you needed to be moved?

A: Yes, sir.

Q: And what did you tell them?

A: I told them, told them that, that I would be like to put [sic] in another cell if it's possible. They asked me why, and I said that I believed that Tyrone has been harassing me and I think he's sexually assaulted me.

. . . .

Q: Are you certain that you told Officer Lynch that Tyrone Ross was harassing you and you wanted to be moved?

A: Yes.

J.A. at 454-55. Although the parties dispute whether this exchange occurred before or after the assault, we believe that the district court correctly ruled that it occurred after. Plaintiff repeatedly contradicted himself on when he notified Lynch of Ross's harassment. For example, plaintiff conceded that "[t]he only thing I blame myself for is not, not telling any of the guards the next day after it [the rape] had happened; that's the only thing I blame myself for." *Id.* at 442. Plaintiff's admissions on cross examination similarly called into question the veracity of his prior testimony:

Q: Now, on these visits to the nurse, you did not make any statements to the nurse to the effect that you were being harassed by Tyrone Ross or being bothered with any type of a sexual assault, did you?

A: No.

Q: And, in fact, the only time that you ever told anybody at the jail that you were having

problems in cell block 3 was after Officer Murph overheard you talking to your mother about it, is that correct?

A: Yes, sir.

Id. at 450. In addition, Dr. Kutty, the prison psychiatrist who treated plaintiff following the rape, testified that plaintiff never told him that he informed the jailers of the harassment as it occurred. *Id.* at 462. We believe that the court correctly directed a verdict for Lynch. Other than plaintiff's self-contradictory testimony, no evidence suggested that Lynch acted with deliberate indifference to plaintiff's safety.

The evidence against Murph was equally deficient. Although plaintiff alleges that security checks were not performed every thirty minutes, as required by prison regulations, plaintiff rests this allegation on the fact that each security check was not logged. Murph, however, offered undisputed testimony that every security check was made but that each check may not have been logged. Because this testimony went unchallenged, we cannot but conclude that plaintiff offered insufficient evidence of Murph's deliberate indifference to withstand a directed verdict. Accordingly, we affirm the directed verdicts in favor of defendants Lynch and Murph.

III

Plaintiff next claims that the district court improperly limited the introduction of evidence relating to defendant Gardner's earlier felony conviction. When plaintiff's counsel on cross-examination sought to elicit details of the conviction, the district court stopped the questioning

on the ground that "the number of felonies doesn't have anything to do with his credibility. The fact that he has been convicted of a felony does affect his credibility; and other than that, it has no purpose at all. . . . " J.A. at 667.

The Supreme Court has held that, in the civil context, Rule 609(a) requires that the trial court admit evidence of a witness's prior convictions regardless of the potential prejudice to either party. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525-26 (1989). Thus, a court may not incorporate the general balancing test of Rule 403 into Rule 609(a) motions in the civil context. *Id.*[1]

Although *Green* clearly establishes that the court must admit evidence of a witness's prior convictions in civil trials, less clear is the scope of evidence of circumstances relating to and surrounding the conviction that must be admitted. We are inclined to believe that *Green* would require admission to the extent urged by the plaintiff in this case, namely, the nature of the crime, the number of counts, and the date of the disposition. Upon review of the record, however, we conclude that the court's refusal to admit details of Gardner's conviction did not affect a substantial right of plaintiff. *See* Fed. R. Evid. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . . "). Despite the court's

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[1] We note that the Supreme Court's holding effectively overrules Part II.B of our opinion in *Donald v. Wilson*, 847 F.2d 1191, 1194-98 (6th Cir. 1988), where we held that evidence of prior convictions offered to attack the credibility of a witness in the civil context is subject to the balancing test of Rule 403.

ruling, the jury returned a verdict against Gardner. Plaintiff's contention that the details of the conviction may have swayed the jury to award a greater amount in damages is simply too speculative to warrant reversal.

IV

Plaintiff next urges that the denial of his motion to add jailers. Waterson, Peters, and Baker as defendants constitutes reversible error. In denying plaintiff's motion, the district court relied principally upon *Schiavone v. Fortune*, 477 U.S. 21 (1986). The Supreme Court, interpreting Federal Rule of Civil Procedure 15(c) ("Relation Back of Amendments"), set forth four requirements for an amendment to "relate back" to the original complaint:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone, 477 U.S. at 29. Following the Court's holding in *Schiavone*, we noted that

> where the complaint alleges in substance that the new defendants committed the illegal acts and are officials of the original defendant, that relationship may imply receipt of sufficient notice. All that we add concerning the inquiry of whether the new defendants knew or should have known that the suit should have been

> brought against them is that it is a patently factual inquiry and left to the district court.

Berndt v. Tennessee, 796 F.2d 879, 884 (6th Cir. 1986) (citations omitted) (footnote omitted).

The sole issue before us is whether the three additional jailers "must or should have known that, but for a mistake concerning identity, the action would have been brought against [them] . . . within the prescribed limitations period." *Schiavone*, 477 U.S. at 29. Tennessee law provides that actions brought under the federal civil rights statutes must be commenced within one year after the cause of action accrued. Tenn. Code Ann. § 28-3-104(a)(3)(Supp.1991). The district court found that the cause of action accrued on October 5, 1986 and concluded that the plaintiff failed to show that the three additional defendants must have received notice of the action no later than October 5, 1987. Plaintiff counters that, because the original complaint listed "other Deputy Sheriffs to be named later," J.A. at 11, knowledge of the lawsuit should be imputed to the three guards.[2]

We believe that the court's finding was not clearly erroneous. Although as jailers the three defendants

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[2] Plaintiff also contends that the filing of the in forma pauperis petition on September 22, 1987 "tolled" the statute of limitations. Even assuming this is true, the statute of limitations would only be tolled with respect to the date within which to file the original complaint, not with respect to the relation back of the additional defendants. Neither party disputes that the original complaint was timely filed.

reasonably could be expected to have known of the instant suit, this alone is insufficient to impute to them knowledge of their future status as defendants. Many jailers and employees who were not named as defendants were aware of and even deposed in this case. It cannot seriously be maintained, however, that knowledge of their interest in the matter should be imputed to all of them. Plaintiff offers no grounds for why jailers Waterson, Peters, and Baker should have been uniquely aware that they were parties in interest. We therefore affirm the district court's denial of plaintiff's motion to add the three additional defendants.

V

As a final matter, plaintiff challenges the district court's limitation of defendants' liability under state law to $40,000. The court so ruled pursuant to Act of May 25, 1982, ch. 950, 1985 Tenn. Pub. Acts 842, *amended by* Tenn. Code Ann. § 29-20-403 (Supp. 1990), which provides that "[e]very policy or contract of insurance purchased by a governmental entity . . . shall provide . . . limits of not less than forty thousand dollars ($40,000)for bodily injury or death."

Plaintiff relies on Tenn. Code Ann. § 19-20-310(b) (1980), which stated at the time plaintiff's cause of action accrued that no judgment may be entered against an employee for damages when the governmental unit is also liable, "unless the amount of damages sought or judgment entered exceeds the minimum limits set out in

§ 29-20-404."[3] Plaintiff submits that, under section 29-20-310(b), Gardner and Hawkins would be liable under state law for any amount exceeding the $40,000 limit of Sullivan County's liability. This interpretation finds strong support in *Jenkins v. Loudon County*, 736 S.W.2d 603, 606 n.5 (Tenn. 1987) which held that, under section 29-20-310(b), "[t]he general rule of personal liability of governmental employees continues for all liability exceeding any limited statutory exposure."

While we agree that defendants Gardner and Hawkins could be liable for any state law award in excess of the $40,000 cap, plaintiff has conceded throughout these proceedings that any award based on state law would be subsumed within the § 1983 award because both claims stem from the same injury. Because we agree that plaintiff has stated a valid claim under § 1983 and is therefore entitled to damages on his federal claim, we believe the district court's mistake had no bearing on the amount of damages awarded below. We simply clarify this issue to assist the parties in any further proceedings.

VI

Defendants, Sullivan County, Gardner, and Hawkins ask us to reverse the denial of their motion for a directed verdict, arguing that because the court dismissed the counts against jailers Lynch and Murph, it was obliged to

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[3] As explained in *Johnson v. Smith*, 621 S.W.2d 570, 572 n.3 (Tenn. Ct. App. 1981), the reference to section 29-20-404 is clearly a typographical error; the reference should be to section 29-20-403, as this section sets out the limits of liability.

direct a verdict for them as well on the basis of *City of Los Angeles v. Heller,* 475 U.S. 796 (1986) (per curiam). In *Heller,* the plaintiff brought suit under § 1983 alleging that he had been arrested without probable cause and had been the victim of excessive force. *Id.* at 797. In a bifurcated trial, the claims against the police officer went to the jury without a qualified immunity instruction. When the jury returned a verdict in favor of the officer, the court dismissed the claims against the City. *Id.* at 798 On appeal, the Supreme Court affirmed, reasoning that, because the jury was not charged on any affirmative defenses, the verdict conclusively established that the plaintiff had not suffered a constitutional injury at the hands of the officer. Absent a constitutional injury, there were no grounds upon which to impose liability upon the municipality. *Id.* at 799. The Court concluded that

> neither *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 . . . (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Heller, 475 U.S. at 799. Defendants argue that because the claims were dismissed against Murph and Lynch, *Heller* precludes liability against them as well. We believe defendants misunderstand the logic of *Heller.*

A § 1983 claim against police officers who assert qualified immunity must be dismissed even if the officers violated the plaintiff's rights, so "long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated" in light of clearly established law. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *accord Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991); *Hall v. Shipley*, 932 F.2d 1147, 1150 (6th Cir. 1991). Conversely, to survive a qualified immunity claim, a plaintiff must show not only that the officer's conduct deprived him of a constitutional right, but also that the officer reasonably should have known that the conduct violated clearly established law. *See Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987). Thus, the dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality (which, of course, is not entitled to qualified immunity) may not be liable for that deprivation. At most it means that an officer in the defendant's position could reasonably have believed that the conduct in question did not violate law that was clearly established at the time.

The Court in *Heller* was careful to point out that the officer in that case had not claimed qualified immunity and, thus, that the jury's verdict established with legal certainty that Heller had not suffered a constitutional deprivation. *Heller*, 475 U.S. at 799; *see also Frost v. Hawkins County Bd. of Educ.*, 851 F.2d 822, 827 (6th Cir.) (interpreting *Heller* as holding that municipality cannot be liable where jury finds that plaintiff suffered no constitutional deprivation), *cert. denied*, 488 U.S. 981 (1988). Thus, *Heller* simply reaffirmed that a determinative issue

in § 1983 claims against municipalities is whether the plaintiff has suffered a deprivation of his constitutional rights. To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would, we are convinced, represent a misconstruction of its holding and rationale. *See Newcomb v. City of Troy*, 719 F.Supp. 1408, 1417 (E.D. Mich. 1989) (holding that municipality may be liable even where claim is dismissed against officer asserting qualified immunity).

In the instant case, the district court dismissed the claims against Murph and Lynch after they asserted qualified immunity, yet accepted the jury's determination that plaintiff suffered a deprivation of his constitutional rights while incarcerated and that Sullivan County, Gardner, and Hawkins were liable for this deprivation. That defendants Lynch and Murph were immune from suit in no way casts doubt on the reasonableness of the court's or the jury's findings. We therefore affirm that the district court did not commit error in denying the motion to dismiss defendants Gardner, Hawkins, and Sullivan County.

Defendants also maintain that a directed verdict in their favor was required given the insufficiency of the evidence supporting plaintiff's Eighth Amendment claim. Defendants point out that only one homosexual assault was reported in the ten years proceeding the incident at issue here and that the prior assault was properly investigated. While conceding that altercations among prisoners frequently occurred, jailers testified at trial that these incidents received prompt and effective attention.

Plaintiff's evidence, of course, presented a much different picture of conditions at the jail. Norman Cox, who testified as defendants' prison expert, stated on cross-examination that the level of violent incidents in August and September of 1986 reached approximately four incidents per month for every 100 inmates. One jailer testified that inmates told him every day that they were in danger and wanted to be moved. Viewing this evidence in the light most favorable to plaintiff, *Frost*, 851 F.2d at 826, we believe the district court ruled correctly in denying the directed verdict motions of Sullivan County, Gardner, and Hawkins on plaintiff's Eighth Amendment claims.

VII

Sullivan County, Gardner, and Hawkins next argue that the jury instructions incorrectly set forth the standards under which they could be found liable under the Eighth and Fourteenth Amendments. In reviewing the adequacy of jury instructions, we "affirm the jury's verdict unless the instructions, viewed as a whole, were confusing, misleading, and prejudicial. Only if the charge insufficiently or misleadingly instructs the jury on an issue crucial to the jury's determination of the dispute should we set aside a jury verdict." *Chonich v. Wayne County Community College*, 874 F.2d 359, 366 (6th Cir. 1989) (citation omitted). We review the jury instructions seriatim.

A. *Eighth Amendments Instructions*

The district court instructed the jury with respect to plaintiff's Eighth Amendment claim as follows:

> Now, plaintiff's Eighth Amendment claim is brought against two policymakers for the Sullivan County Jail and against Sullivan County. In order to provide this claim, the burden is on the plaintiff to establish the following by a preponderance of the evidence:
>
> One, a pervasive risk of harm existed at the jail prior to the time that the plaintiff was incarcerated there in September 1986.
>
> Now, this element requires the plaintiff to show that his being assaulted was not an isolated incident. A pervasive risk of harm can be established on evidence showing that inmates at the jail felt unsafe; that jail operations invited a risk of harm; or that a high incident [sic] of violence occurred at the jail.
>
> Now, the second element of the offense charged which must be proven is that the plaintiff belonged to a class of individuals likely to be attacked.
>
> . . . .
>
> Now, third, the policies controlling at the jail, the plaintiff must prove that the policies controlling at the jail exhibited a deliberate indifference to the threat to the plaintiff's physical safety.
>
> Now, under this third element, deliberate indifference can be established on evidence showing that despite an unreasonable risk of harm, the defendants failed to guard against

this risk; or that customs, practices or policies at the jail facilitated the risk of harm.

And then the fourth element the plaintiff must prove is that the policies at issue was [sic] the proximate cause of injury and consequential damages to the plaintiff.

Now, deliberate indifference is more than mere "recklessness" on the part of any county official. "Recklessness" requires only proof that a reasonable man would have appreciated the great degree of risk of physical harm to the plaintiff. In order for an act to be "deliberate," the particular official mut have been shown to have been aware that adverse consequences from his action were certain or substantially certain to cause the injury.

Now, before you can find that any defendant was deliberately indifferent, the plaintiff must prove that the individual defendant was aware that a particular act or inaction was certain or substantially – certain to deprive the plaintiff of his constitutional rights and that the defendants decided to act or not to act in spite of that knowledge.

J.A. at 722-24.

Although these instructions are essentially the same as those proposed to the court by the defendants, they now object that (1) the district court stated that the jury must find a "pervasive risk of harm" where defendants preferred "pervasive risk of homosexual attack," (2) the court allowed the jury to consider the inmate's appearance and intelligence level in determining whether he was likely to be attacked, and (3) the jury was not instructed that a constitutional violation does not occur

each time an inmate is attacked. After careful consideration, we do not believe that these objections warrant reversal. The instructions accurately stated each element that plaintiff was required to establish under the Eighth Amendment, including the requirement that the evidence support a finding of "deliberate indifference." *See Roland v. Johnson*, 856 F.2d 764, 769 (6th Cir. 1988). We therefore hold that the Eighth amendment jury instructions were sufficient.

B. *Fourteenth Amendment Instructions*

The court's instructions with respect to plaintiff's Fourteenth Amendment claim were as follows:

> [U]nder the fourteenth amendment, an individual cannot be deprived by the government of life, liberty or property without due process of law. Now, due process is that which protects the individual from arbitrarily losing his protected interest, requiring that the individual be notified of the deprivation and given an opportunity to dispute it. A protected liberty interest may be created through statutes, rules, regulations or policy statements. In this case, plaintiff had a liberty interest protected by the Fourteenth Amendment to be classified according to his physical and mental attributes and the nature of the crime for which he was convicted. Pursuant to this liberty interest, plaintiff can recover if you find the following by a preponderance of the evidence.
>
> One, that the plaintiff was deprived of his liberty interest without due process of law;

> and, second, that the deprivation proximately caused the plaintiff to be injured.
>
> Now since the injuries cannot be presumed to flow from every violation of constitutional or state law rights, plaintiff must also prove by a preponderance of the evidence that the defendants' acts or omissions proximately caused his injuries. Now, a proximate cause of an injury is a cause which in natural and continuous sequence produces the injury and without which the injury would not have occurred. A defendant's act in order to be a proximate or legal cause of a plaintiff's injuries need not have been the whole cause or the only factor in bringing them about. It is enough if the act was a substantial factor in causing the plaintiff's injuries.

J.A. at 724-25.

Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause and the laws and regulations of the States. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). As an initial matter, defendants direct our attention to *Whitley v. Albers*, 475 U.S. 312 (1986) and *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990), to support their claim that the instructions should have informed the jury that plaintiff could only recover if defendants' actions were obdurate or wanton. In *Whitley*, the Supreme Court indicated that the Fourteenth Amendment affords no greater protection than the Eighth Amendment for inmate claims alleging unlawful infliction of pain or punishment and, thus, that such claims fall solely under the Eighth Amendment. *Whitley*, 475 U.S. at 327. The Court reasoned as follows:

> We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. . . . Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to that question outside the prison security context by holding, as we do, that in these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishment Clause.

Id. at 327; *accord Walker,* at 1455 (requiring that prisoner's claim predicated on stabbing incident in prison be brought under the Eighth Amendment rather than as a substantive due process claim under the Fourteenth Amendment).

While we agree that a showing of wantonness is required to establish a violation of an inmate's *substantive* due process rights, we find that issue irrelevant to the case at bar for the simple reason that the Fourteenth Amendment instructions here quite clearly addressed only the *procedural* component of the Due Process Clause, that is, whether the deprivation, without a hearing, of liberty interests established under state law, violated plaintiff's Fourteenth Amendment rights. The court instructed the jury that "due process is that which protects the individual from *arbitrarily* losing his protected interest, requiring that the individual be *notified* of the

deprivation and *given an opportunity to dispute it. A protected liberty interest may be created through statutes, rules, regulations, or policy statements.*" J.A. at 724 (emphasis added). Thus, the jury instructions simply did not speak to liberty interests emanating from the *substantive* component of the Due Process clause.

Similarly, *Whitley* and *Walker* address the overlap only between inmate claims arising under both the Eighth Amendment and the substantive branch of the Due Process Clause. This is because both clauses address the substantive protections enjoyed by incarcerated individuals against the "wanton infliction of pain in penal institutions." *Whitley*, 475 U.S. at 327. The procedural component of the Due Process Clause, by contract, addresses the quite distinct right of individuals to a hearing regarding the deprivation by the state of a liberty interest established elsewhere, as, for instance, in state law. Because the Fourteenth Amendment instructions in the case at bar clearly addressed only the procedural and not the substantive component of the Due Process Clause, we find the concerns expressed in *Whitley* and *Walker* inapposite to our analysis.

Plaintiff clearly rested his underlying liberty interest on state law. Whether state law establishes a protected liberty interest requires a close examination of the language of the relevant statutes and regulations. *Thompson*, 490 S.Ct. at 461. For instance, the use of "explicitly mandatory language" in connection with "specified substantive predicates" that limit the decisionmaker's discretion will support the conclusion that the State has created a liberty interest. *Id.* at 463. "If this liberty interest exists as a function of state law, then the prisoner or inmate is

entitled 'to those minimum procedures appropriate under the circumstances and required by the Due Process clause to insure that the state-created right is not arbitrarily abrogated.' " *Martucci v. Johnson*, 944 F.2d 291, 294 (6th Cir. 1991) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

This court has stated that "where substantive limitations have in fact been placed on the discretion of prison officials in classifying inmate's [sic] security status, a protectible liberty interest has been created." *Beard v. Livesay*, 798 F.2d 874, 879 (6th Cir. 1986). In the instant case, entry classification procedures were governed by the Sullivan County Jail Manual of Policy and Procedures ("Manual"). The Manual contains explicit mandatory language regarding classification. The section entitled *"Policy:* – Classification of Inmates," states that

> [f]or the preservation of the security and order of the detention facility, its staff and inmates, every inmate *will* be classified upon admission [to] the facility, and *will* be assigned housing according to the classification.

J.A. at 208 (emphasis added).[4] The following subsection entitled "Procedure" contains equally explicit mandatory

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[4] The full text of this section reads as follows:

POLICY: – CLASSIFICATION OF INMATES

> There is a written plan for prisoner classification specifying criteria and procedures for classifying prisoners in terms of level of custody required, housing assignment and participation in correctional programs.

(Continued on following page)

language ensuring that "[t]he Jail Administrator, Chief Jailer, or Booking Officer, *will* review the admissions

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(Continued from previous page)

NOTE: Some of the factors to consider might be: history of violence or nonviolence; male v. female; protective custody; security risks; and age.

There will be separation among:

A. Males and females

b. Adults and juveniles

For the preservation of the security and order of the detention facility, its staff and inmates, every inmate will be classified upon admission the the [sic] facility, and will be assigned housing according to the classification. There will be no discrimination by race, creed, religion, or national origin.

Physical Separation of Classes of Inmates – The facility will make every reasonable effort to provide separate housing for each of the following categories of inmates:

- Usentenced [sic] Females
- Sentenced Females
- Unsentenced Males
- Sentenced Males
- Other Classes of Detainees, e.g., Witnesses, Civil Prisoners
- Community Custody Inmates, e.g., Work Releases, Weekenders, Trusties
- Inmates with special problems, E.G., Alcoholics, Narcotic addits [sic], Mentally Disturbed Persons, Physically Handicapped Persons, Persons with Communicable Diseases
- Inmates Requiring Disciplinary Detention
- Inmates Requiring Administrative Segregation
- Juveniles

(Continued on following page)

records and any existing facility records concerning the inmate," and that [t]he Booking Officer *will* then assign a

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(Continued from previous page)

PROCEDURE

1. *Review of records:* The Jail Administrator, Chief Jailer, or Booking Officer, will review the admissions records and any existing facility records concerning the inmate for the following information:
   a. Sex
   b. Age (Juvenile or Adult)
   c. Offense
   d. Legal Status
      1. sentenced
      2. unsentenced
      3. state witness
      4. work release
   e. History of Violent or Disruptive Behavior
   f. Evidence of Homosexualty or Vulnerability to attack
   g. Evidence of Mental or Physical Handicap
   h. Evidence of Suicidal Tendency
2. *Classification:* The Booking Officer will then assign a classification code, in the order listed below:
   a. Sex - "M" (male)or "F" (female)
   b. Age – "A"(adult)or "J" (juvenile)
   c. Violence - "V" (potentially violent) or "N" (non-violent)
   d. Legal status- "P" (pre-trial) or "S" (sentenced)
   e. Special Problem- "Sp" (special problem) or X"WR" (work release – trustee)

J.A. at 208-09.

classification code." *Id.* at 209 (emphasis added). Moreover, the Manual sets forth specific substantive predicates that limit prison officials' discretion in classifying inmates. Of particular relevance to the instant case, the procedures require prison officials to consider an inmate's "History of Violent or Disruptive Behavior," "Evidence of Homosexuality or Vulnerability to attack," and "Evidence of Mental or Physical Handicap." *Id.* The regulations thus established a protectible liberty interest in classifying plaintiff with regard to his safety and mental disabilities.

The Supreme Court has recently reiterated that, under the rubric of procedural due process, "the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Thus, where procedural due process is alleged, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Id.* at 126.

To determine what procedural protections are constitutionally required in the given case, several factors come into play:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal

> and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Whether the postdeprivation remedies provide constitutionally adequate recourse will turn on "whether predeprivation procedural safeguards could address the risk of deprivations of the kind . . . allege[d]," *Zinermon*, 494 U.S. at 132, or "whether predeprivation safeguards would have any value in guarding against the kind of deprivation . . . allegedly suffered." *Id.* at 135. The above determination, in turn, will rest on such issues as whether the deprivation was predictable, whether a predeprivation process is possible, and whether the defendants' conduct was "authorized" in the sense that "[t]he State delegated to [state employees] the power and the authority to effect the very deprivation complained of . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law." *Id.* at 138.

As this synopsis illustrates, whether state officials deprived a complainant of procedural due process is an extremely intricate and complex inquiry requiring the balancing of many competing concerns. The instructions in the case at bar, we believe, fail to reflect this complexity. On the instructions given, the jury could have returned a verdict for plaintiff on the legally uninformed determination that defendants deprived plaintiff's liberty interests "arbitrarily" and "without due process of law." In making this determination, the jury was not asked to consider whether plaintiff's constitutional interest in adequate procedure was satisfied by postdeprivation state law remedies, or even whether a predeprivation hearing

was a meaningful possibility under the circumstances. Given the extreme brevity of the charge, we believe it quite possible that the jury was confused or misled as to the basis for which it properly could have found defendants liable under the Fourteenth Amendment. We therefore conclude that the jury instructions given by the district court constitute reversible error.

VIII

Defendants next insist that the district court committed reversible error in preventing the testimony of Murph, who was present at the time of the rape. Federal Rule of Evidence 403 permits the exclusion of evidence where its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. On review, we uphold trial court decisions on admissibility under Rule 403 unless there is a clear abuse of discretion and the court's decision is inconsistent with substantial justice. *See Zamlen v. City of Cleveland*, 906 F.2d 209, 215 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 1388 (1991). Defendants submit that Murph was prepared to testify that plaintiff was "slammed" in with Ross for no more than two to three minutes and that plaintiff's account of the incident was greatly exaggerated. Defendants contend this testimony would have impacted the amount of compensatory damages.

The court had already granted Murph's motion for a directed verdict when defense counsel sought to admit Murph's testimony. After excusing the jury, the court stated that it would reconsider its directed verdict for

Murph if his testimony cast doubt on that ruling. Murph chose not to testify. At the close of trial, defendants again sought to offer Murph's testimony into evidence. At this point, the district court disallowed the testimony on the ground that, given the evidence already proffered by both parties, Murph's testimony would be repetitive. Our review of the record compels us to conclude that these rulings by the court did not amount to an abuse of discretion.

IX

As a final matter, Sullivan County argues that plaintiff is not entitled to a state law judgment based on negligence because the state has not waived its sovereign immunity from suit for alleged civil rights violations. Sullivan County rests its contention on the Tennessee Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. §§ 29-20-101 to 407 (1980 & Supp. 1990). In particular, section 29-20-205 of the GTLA provides in relevant part that "[i]mmunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury: . . . (2)Arises out of . . . invasion of right of privacy, or civil rights." Tenn. Code Ann. § 29-20-205 (1990). Plaintiff's state law claim relies on section 8-8-302 of the Tennessee Code, which provides that

> [a]nyone incurring any wrong, injury, loss, damage or expense resulting from any act or failure to act on the part of any deputy appointed by the sheriff may bring suit against the county in

> which the sheriff serves; provided, that the deputy is, at the time of such occurrence, acting by virtue of, or under color of his office.

Tenn. Code Ann. § 8-8-302 (1988).

In *Jenkins v. Loudon County*, 736 S.W.2d 603 (Tenn. 1987), the Supreme Court of Tennessee held that section 29-20-205 did not preclude an award for damages flowing from a deputy sheriff's violation of plaintiff's civil rights sought pursuant to the provisions of sections 8-8-301 through 8-8-303. *Id.* at 609. In concluding that sovereign immunity was not preserved by section 29-20-205, the Court reasoned that "[a]ctions for the *non-negligent* misconduct of deputies do not 'aris[e] pursuant to' the GTLA . . . and may therefore be covered by T[enn.] C[ode] A[nn.] § 8-8-301, *et seq.*, in the appropriate cases." *Id.* (emphasis added). The Court cautioned, however, that its holding did not extend to actions for negligence. *Id.*

The district court justified its award of $40,000 under state law on the grounds that the violation of plaintiff's civil rights also constituted negligence. We instruct the district court on remand to consider whether plaintiff is entitled to an award under state law in light of the jury's verdict under the Eighth Amendment that defendants were deliberately indifferent to plaintiff's constitutional rights.

X

For the reasons stated above, we find that the error in the district court's instructions is such that there is no way of determining if the jury's verdict was predicated

on the Eight Amendment claim or the erroneous instruction regarding the Fourteenth Amendment claim. We therefore **REVERSE** and **REMAND** for proceedings consistent with this opinion, including a reconsideration of the state law award. All other aspects of the disposition of the district court are **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 90-5288: 90-5346: 90-5348

JOHN DOE,

Plaintiff - Appellee,
Cross-Appellant (90-5288/5348),
Appellant (90-5346),

v.

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER; LYNN HAWKINS;

Defendants - Appellants
Cross-Appellees (90-5288/5348),

LON V. BOYD, KEITH WESTMORELAND;
MURPH, Deputy Sheriff;
CONNER, Deputy Sheriff; LYNCH,
Deputy Sheriff; TYRONNE ROSS,
Defendants.

Before: **Jones** and **Suhrheinrich,** Circuit Judges,
Joiner, Senior District Judge

JUDGMENT

(Filed Feb. 10, 1992)

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Greeneville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is reversed and remanded for proceedings consistent with the opinion, including a reconsideration of state law award. IT IS FURTHER ORDERED that in all other respects the judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

Issued as Mandate: 3/3/92

COSTS: No Costs

Filing Fee .....$
Printing .....$
Total .....$

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

JOHN DOE	)	
	)	
v.	)	
	)	
SULLIVAN COUNTY,	)	NO. CIV-2-87-266
MIKE GARDNER, LON V.	)	
BOYD, KEITH	)	
WESTMORELAND, LYNN	)	
HAWKINS, DEPUTY	)	
SHERIFF MURPH,	)	
DEPUTY SHERIFF	)	
CONNER, and DEPUTY	)	
SHERIFF LYNCH	)	

FINAL PRETRIAL ORDER

(Filed May 15, 1989)

This action came before the Court for a pretrial conference, pursuant to Rule 16, Federal Rules of Civil Procedure, on May 11, 1989. Charles Vance Ketron, Esq. and Penny J. White, Esq., appeared as counsel for the plaintiff. Charlton R. DeVault, Esq., and Gene H. Tunnell, Esq., appeared as counsel for the defendants.

The following actions were taken:

A. JURISDICTION:

This is a civil rights case filed pursuant to 42 U.S.C. § 1983. There are also pendent state law claims. Jurisdiction is predicated upon 28 U.S.C § 1343 and is not contested.

B. ADMISSIONS AND STIPULATIONS:

The following facts are established by admissions in the pleadings or by stipulations of counsel at the pretrial conference:

1. At all times relevant, the plaintiff is and was a resident of the City of Kingsport, Sullivan County, Tennessee.

2. Tyronne Ross was a resident of Sullivan County, Tennessee, in September, 1986. At all times relevant herein, he was an inmate at the Sullivan County Jail. Currently, he is an inmate at Carter County Work Camp. Default judgment has been entered against him in this lawsuit.

3. Defendant Sullivan County is a political subdivision of the State of Tennessee.

4. At all times relevant, defendant Mike Gardner was the Sheriff of Sullivan County, Tennessee, and was acting in his official capacity and under color of law. At all relevant times, defendants Murph, Conner, and Lynch were employees of the Sullivan County Sheriff's Department and acted under color of law. All defendants are sued in their individual and official capacities.

5. Defendant Keith Westmoreland, the current County Executive for Sullivan County, was the Sheriff's Chief Deputy of the Sullivan County Jail prior to August 29, 1986 and was acting in his official capacity and under color of law.

6. Defendant Lon V. Boyd was County Executive of the Sullivan County Jail from some time before September 1, 1980 until August 29, 1986 and acted in his official capacity and under color of law.

7. At all relevant times, defendant Lynn Hawkins was Jail Superintendent of the Sullivan County Jail and was acting in his official capacity and under color of law.

8. Plaintiff was arrested and placed in the Sullivan County Jail on September 6, 1986. He was nineteen years old. On September 11, 1986, plaintiff pled guilty to a misdemeanor and was sentenced to eleven months and twenty-nine days, with six months confinement at the Sullivan County Jail, with the remaining five months and twenty-nine days to be served on probation. At all times relevant, plaintiff was held in custody in the Sullivan County Jail.

C. GENERAL NATURE OF THE CLAIMS OF THE PARTIES:

1. Plaintiff alleges that while incarcerated at the Sullivan County Jail, he was violently assaulted by jailmates on several occasions from September 23 through October 5, 1986; that he is physically small of stature and has an obvious mental disability, and defendants knew or reasonably should have known that plaintiff was not able to protect himself from inmate assaults as the average prisoner at the Sullivan County Jail. Therefore, argues the plaintiff, the defendants were under a duty to protect plaintiff from assaults, abuse, or rape. The plaintiff further argues that the defendants knew at the time of plaintiff's incarceration, as a result of a federal court

order of July 28, 1986, that the jail was grossly and unconstitutionally overcrowded and that this condition created an unreasonable risk of inmate assault and excessive violence among the inmates. The defendants were aware that similar sexual assaults had occurred but failed to protect the plaintiff from the unreasonable risk of inmate assault.

The plaintiff further alleges that the following acts or omissions by the defendants proximately caused his injuries and violated his eighth amendment right to be free from cruel and unusual punishment, his fourteenth amendment right to receive due process of law prior to deprivation of liberty, and his rights as protected in Art. I, subsection 8 of the Tennessee Constitution. He argues that he is entitled to relief, under § 1983, for these violations and to relief against the county under Tenn. Code Ann. § 8-8-302, *et seq.*, "suits against counties for wrongs of deputies", and from the defendant guards under the Governmental Tort Liability Act, Tenn. Code Ann. §§ 29-2-201, *et seq.*:

> (1) Defendants Gardner, Hawkins, Murph, Conner, and Lynch breached their duties to treat plaintiff humanely and properly care for him as a prisoner. (Tenn. Code Ann. §§ 41-2-108 and 41-2-109);
>
> (2) Defendants Sullivan County, Gardner, Westmoreland, and Hawkins failed to employ a sufficient number of guards to safely house plaintiff; failed to meet minimum standards of safety (Tenn. Code Ann. § 41-4-140); failed to properly train deputy sheriffs or require their participation in approved classes (Tenn. Code Ann. §§ 41-4-104 and 39-5-348); failed to provide

adequate lighting in the jail cells as required by Tennessee Corrections Institute regulations; and failed to use an appropriate system for monitoring the jail;

(3) Defendants Westmoreland and Boyd failed to properly inspect the Sullivan County Jail (Tenn. Code Ann. § 41-4-116);

(4) Defendant Gardner breached his duty to transfer plaintiff to the nearest sufficient and safe jail (Tenn. Code Ann. § 41-4-121); and

(5) Defendants Lynch, Murph, and Conner failed to properly classify plaintiff, to segregate him, to request additional assistance of jail personnel as needed, to periodically make security checks, and to properly guard plaintiff or provide proper surveillance.

Plaintiff further avers that each of the acts and failures to act were the policy or custom of the Sullivan County Jail, and that the continuation of these policies by defendants was in wanton disregard and with conscious indifference to the federal and state constitutional rights of plaintiff, as well as plaintiff's rights under the laws of Tennessee. Plaintiff argues that defendants Gardner, Westmoreland, Boyd, and Hawkins, in their official capacities enacted, adopted, or acquiesced in the customs or policies which deprived plaintiff of these rights.

Plaintiff seeks compensatory damages in the amount of $1,000,000.00 for his pain and suffering, humiliation, psychological trauma and anguish, all of which are permanent in nature and require ongoing medical care at the

cost of $4,260 annually. He further alleges that the conduct of defendants was performed intentionally and maliciously, thereby entitling him to an award of punitive damages against each defendant, except defendant Sullivan County, in the amount of $1,000,000.00.

2. All of the defendants deny that they violated the plaintiff's federal constitutional rights and/or state law rights. They argue that the plaintiff acted in reckless disregard by failing and refusing to report any alleged assaults to Sullivan County jail authorities. In defense of the state law claims, defendants argue that the plaintiff's conduct constituted contributory negligence. (All other defenses are legal in nature and appear in Section E of this order.)

D. CONTESTED ISSUES OF FACT:

The contested issues of fact remaining for decision are:

1. Are the defendants liable to the plaintiff?

2. If so, in what amount?

3. Are the defendants, other than Sullivan County, liable for punitives?

4. If so, in what amount?

E. CONTESTED ISSUES OF LAW:

The contested issues of law requiring special attention of Court and counsel are as follows:

1. Whether the Governmental Tort Liability Act bars the plaintiff's state law claims?

2. Whether the Court should exercise pendent jurisdiction over the state law claims?

3. Whether the plaintiff can recover punitive damages on his state law claims?

4. Whether the individual defendants are entitled to qualified good faith immunity?

5. Whether Sullivan County is absolutely immune, as a legislative body, from all claims in this lawsuit?

6. Whether the plaintiff has stated a claim for recovery for alleged loss of liberty interest as protected by the fourteenth amendment?

7. What is the standard of proof for the plaintiff's § 1983 claims in which he alleges violations of his eighth and fourteenth amendment rights?

The parties should brief *only* those issues listed above that have not been addressed in the motions for summary judgment and responses thereto, or in the briefs which were to be filed at the final pretrial conference. These additional briefs shall be filed no later than May 22, 1989.

F. OTHER MATTERS:

1. Any party may except to this pretrial order within four days after its filing but, unless modified or supplemented by the undersigned, this order shall be binding on all parties at trial.

2. This pretrial order shall supplant the pleadings.

3. Proposed jury instructions shall be filed no later than May 24, 1989

H. TRIAL INFORMATION:

1. This action hereby is assigned for trial before United States District Judge Thomas G. Hull with a jury to commence at 9:00 a.m. on May 31, 1989.

2. The estimated length of trial is two days.

3. The possibility of settlement prior to trial is considered poor.

ENTER:

/s/ Joe A. Tilson
JOE A. TILSON
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

JOHN DOE	)	
	)	
v.	)	NO. CIV-2-87-266
SULLIVAN COUNTY, MIKE GARDNER, LON V. BOYD, KEITH WESTMORELAND, LYNN HAWKINS, DEPUTY SHERIFF MURPH, DEPUTY SHERIFF CONNER, and DEPUTY SHERIFF LYNCH	)	

ORDER

(Filed Sep. 29, 1989)

Plaintiff seeks to recover in this action for injuries alleged to have occurred at the Sullivan County Jail. Pursuant to the Final Pretrial Order, plaintiff's theories of recovery are stated under 42 U.S.C. Section 1983 and T.C.A. Sections 8-8-302 and 29-20-201, *et seq.* This case proceeded to trial on September 21, 1989. At the close of plaintiff's proof, all defendants moved for directed verdict. This Order memorializes the Court's ruling.

I. COUNTY EXECUTIVE

Lon V. Boyd and Keith Westmoreland were sued in this case because Mr. Boyd served as Sullivan County's County Executive up until August 29, 1986, when Mr. Westmoreland succeeded him as county executive. Prior to August 29, 1986, Mr. Westmoreland served as chief deputy at the jail. Viewing the evidence most favorably to

the plaintiff, the Court finds that no proof was adduced showing that either Mr. Boyd or Mr. Westmoreland committed any act against plaintiff or created any policy proximately causing harm to the plaintiff. Therefore, a reasonable factfinder could find only for these defendants and against plaintiff. Consequently, the Court GRANTS the motion for directed verdict made on behalf of Mr. Boyd and Mr. Westmoreland.

II. DEPUTY SHERIFFS

Deputy Sheriffs Lynch, Conner, and Murph were sued in this case because they served as guards at the jail at the time the principal assault is alleged to have occurred. At trial, plaintiff moved to dismiss Deputy Sheriff Conner and this motion was granted with prejudice. As against the remaining deputies under plaintiff's Section 1983 claim, the Court finds no evidence was adduced showing that the deputies either knew or should have known that an assault on the plaintiff was highly foreseeable. Moreover, the Court finds that plaintiff failed to produce evidence of conduct by these individuals sufficient for a reasonably fact finder to find deliberate indifference. Furthermore, the record lacks any evidence on which a reasonable factfinder could conclude that conduct by the deputies proximately caused plaintiff to be harmed. Because this evidence of proximate cause is essential to all of plaintiff's claim against the deputies, the Court concludes that a reasonable factfinder could find only for these defendants and against plaintiff. Consequently, the Court GRANTS the motion for directed verdict made on behalf of Deputy Sheriffs Murph and Lynch.

III. SECTION 1983 THEORIES

Plaintiff supported his Section 1983 claim with three theories: plaintiff's eighth amendment rights were violated as a result of crowded conditions, poor lighting, and insufficient surveillance; plaintiff's eighth amendment rights were violated as a result of improper classification; and plaintiff's fourteenth amendment rights were violated as a result of being denied classification. The Court finds that the evidence adduced at trial is insufficient to support the crowding-lighting-surveillance theory. Specifically, The [sic] Court finds Plaintiff failed to produce any evidence showing a causal relationship between his injuries and crowding, insufficient lighting, or improper surveillance. Accordingly, all defendants are GRANTED a directed verdict on this theory.

IV. STATE LAW THEORIES

Because the Court has already found that no evidence was adduced causually [sic] linking conduct by Mr. Boyd or Mr. Westmoreland to plaintiff's injuries, Sullivan County cannot be held liable under T.C.A. § 29-20-201, *et seq.* (GTLA) for any conduct by Mr. Boyd or Mr. Westmoreland. Accordingly, the Court GRANTS a directed verdict in favor of Sullivan County on plaintiff's GTLA claim for any conduct by Mr. Boyd or Mr. Westmoreland.

Because the Court has already found that no evidence was adduced causually [sic] linking conduct by Deputy Sheriffs Murph, Conner, and Lynch to plaintiff's injuries, Sullivan County cannot be held liable under either T.C.A. § 29-20-201, *et seq.* or § 8-8-302 for any conduct by the deputy sheriffs. Accordingly the Court

GRANTS a directed verdict in favor of Sullivan County on plaintiff's GTLA claim for any conduct by Deputy Sheriffs Murph, Conner, and Lynch. The Court further GRANTS a directed verdict in favor of Sullivan County on plaintiff's T.C.A. § 8-8-302 claim.

V. SUMMARY

Pursuant to this Order, plaintiff's § 1983 claim will proceed against Sullivan County, Mike Gardner, and Lynn Hawkins. This claim will be submitted to the jury on plaintiff's classification theories under the eighth and fourteenth amendments. No other claim remains for the jury to decide. Under Plaintiff's GTLA claim, the Court will consider only evidence adduced against Mike Gardner and Lynn Hawkins.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

JOHN DOE	)	
	)	NO. CIV-2-87-266
v.	)	
	)	
SULLIVAN COUNTY,	)	
ET AL.	)	

ORDER

(Filed Jan. 19, 1990)

In an earlier Order (Doc. 121), this Court bifurcated plaintiff's state law claims against Sullivan County for negligence and gross negligence pursuant to T.C.A. § 29-20-307. Based on this bifurcation, the plaintiff's motion (Doc. 174), and the defendant's response (Doc. 176), the Court renders the following judgment.

For purposes of the claims at issue, the Court previously ruled the only evidence that would be considered is that adduced against Mike Gardner and Lynn Hawkins. (Doc. 159). As against Mr. Gardner, plaintiff alleged a failure to keep and properly care for the plaintiff during his incarceration as required under T.C.A. § 41-2-108 (Doc. 86). As against Mr. Hawkins, plaintiff alleged a violation of the duty imposed under T.C.A. § 41-2-109 to insure that plaintiff was kindly and humanely treated during his incarceration (Doc. 86). For plaintiff's state law claims, the court heard no evidence additional to that put before the jury for plaintiff's claim under 42 U.S.C. § 1983.

At trial, the jury was given instructions for two theories of recovery under 42 U.S.C. § 1983; one under the eighth amendment and the other under the fourteenth amendment. No instructions were given for any other cause of action. Pursuant to these instructions, the jury returned a verdict in favor of plaintiff. Therefore, the jury must have concluded that plaintiff's civil rights were violated under color of law, causing injuries to the plaintiff compensable in damages. Because the jury found plaintiff's injuries arose from violation of his civil rights, the defendants claim the County is immune to plaintiff's state law claim, citing for authority T.C.A. § 29-20-205(2).

The Court disagrees, relying on the reasoning stated in *McKenna v. City of Memphis,* 544 F. Supp. 415 (1982) *aff'd.* 785 F.2d 560. The acts of negligence alleged by plaintiff constitute breaches of duties cognizable in the common and statutory law. *Willis v. Barksdale,* 625 F. Supp. 411, 421 (W.D. Tenn. 1985). Just as in *McKenna, supra,* conduct such as that which plaintiff attributes to defendants violates plaintiff's civil rights " . . . and yet also constitute[s] negligence resulting in damages without regard to civil or constitutional rights." *Id.* at 419. As noted by the learned judge in *McKenna, supra,* Tennessee courts unfortunately have not ruled on this close issue. Without guidance from the state courts, the Court defers to the well-reasoned decision in *McKenna, supra.*

The Court finds a preponderance of the evidence in this case supports plaintiff's claims. Having reached this conclusion, the Court next considers the issues of damages.

Defendants contend the County's liability is limited to $40,000.00 by T.C.A. § 29-20-403. The plaintiff does not challenge defendants' contention. Therefore, the Court finds the County's maximum liability on plaintiff's state law claims is $40,000.00. The award made by the jury on plaintiff's federal claim exceeds the county's maximum liability. Plaintiff's state law claims arise from the same incidents underlying his federal claim. Furthermore, no evidence was adduced showing plaintiff's damages for his state law claim differed or were in addition to those for his federal claim. Therefore, the Court finds that plaintiff is not entitled to an award of damages additional to that already awarded; the award for plaintiff's state law claims is subsumed by the award for plaintiff's federal claim.

Based on the foregoing, the Court ORDERS that judgment be entered in favor of plaintiff on his state law claims in the amount of $40,000.00 and against the defendant Sullivan County. However, the amount of plaintiff's award on his state law claims is subsumed by and is not in addition to the amount awarded to plaintiff on his federal claim.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

Tennessee Code Annotated § 41-4-140:

Standards prescribed by Tennessee corrections institute. – (a) The Tennessee corrections institute has the power and its duty is to:

(1) Establish minimum standards for local jails, lock-ups, workhouse and detention facilities, including, but not limited to, standards for physical facilities and standards for correctional programs of treatment, education and rehabilitation of inmates, and standards for the safekeeping, health and welfare of inmates. Such standards shall be established by the Tennessee corrections institute and shall approximate, insofar as possible, those standards established by the inspector of jails, federal bureau of prisons, and by the American Correctional Association's Manual of Correctional Standards, or such other similar publications as the institute shall deem necessary;

(2) Inspect all local jails, lock-ups, workhouses and detention facilities at least once a year and to publish the results of such inspections. Inspections shall be based on the established standards mentioned in subdivision (a)(1); and

(3) Have full authority to establish and enforce procedures to ensure compliance with the standards set out in subdivision (a)(1) so as to ensure the welfare of all persons committed to such institutions. Failure on the part of the county, municipality or political subdivision to maintain standards established under this section shall be reported by the board of control of the institute to the commissioner of correction, sheriff, county executive, judge, mayor or head of the political subdivision, as

appropriate, in which such jail or penal institution is located. This report shall specify deficiencies and departures from such standards and order their correction. At the request of the commissioner, the institute may assist the department of correction in establishing standards for state institutions similar to the standards provided for in subdivision (a)(1).

(b)(1) If, after inspection of a local correctional facility as provided in subdivision (a)(2), such facility is determined not to be in compliance with the minimum standards, the board of control or any of its authorized staff may grant such facility an extension not to exceed sixty (60) days for the purpose of making such improvements as are necessary to bring the facility into compliance with the minimum standards. During the period of such extension, the facility shall maintain the same certification status as it had prior to the most recent inspection. No additional extensions may be granted, and the certification status given a facility upon reinspection shall be the facility's status until the next annual inspection.

(2) No local correctional facility shall be denied a certificate of compliance with the minimum standards for the sole purpose of calculating the level of reimbursement upon the certified or not certified determination if the sole cause is based on overcrowding because of prisoners sentenced to the department whose commitments are delayed pursuant to chapter 1, part 5 of this title or pursuant to a federal court order when such prisoners are being held by a county pending such commitment.

(c)(1) The minimum standards established pursuant to subsection (a) shall also apply to any jail, lock-up,

workhouse or detention facility used for the temporary housing or the incarceration of persons convicted or accused of a state or federal criminal offense that is owned or operated in this state by a private person or corporation.

(2) The institute also has the duty to inspect, at least once a year, all such private jails, lock-ups, workhouses and detention facilities operating in this state in the same manner as is provided in subsection (a).

(3) If, after inspection of a private correctional facility as provided in this section, such facility is determined not to be in compliance with the minimum standards, the board of control or any of its authorized staff may grant such facility an extension not to exceed sixty (60) days. If the facility is still not in compliance with the applicable standards, the operators of such facility shall be in violation of this section.

(4) It is a misdemeanor to operate a private correctional facility in violation of this section. If the operator of a private correctional facility is convicted of violating this subsection and the owner of such facility is a person or corporation other than the operator, such owner shall be prohibited from holding any interest in a company or corporation that is engaged in this state in the temporary housing or the incarceration of persons convicted or accused of a state or federal criminal offense for a period of two (2) years.

(5) The provisions of this section shall not apply to a private correctional facility operated pursuant to chapter 24 of this title, nor to a contract with a political subdivision of the state.

(d) No local currently certified facility shall be decertified if that local government has submitted a plan within sixty (60) days of the initial annual inspection which is reasonably expected to eliminate fixed ratio deficiencies in that facility and cause such facility to remain certified.

(e) The total number of prisoners awaiting transfer to the department penal system shall be discounted from any computations used to determine compliance with standards used by the institute if the governor has invoked the power of delayed intake pursuant to § 41-1-504(a)(2), or a federal or state court has delayed intake into the department penal system, or both such events. [Acts 1973, ch. 191, § 1; impl. am. Acts 1978, ch. 934, §§ 16, 36; 1980, ch. 913, §§ 2-6; T.C.A., § 41-1144; Acts 1984, ch. 938, §§ 11-13; 1985, ch. 161, § 1; 1987, ch. 258, § 1; 1989, ch. 477, §§ 1-3.]

Supreme Court, U.S.
FILED
AUG 12 1992
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No. 92-78

In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioners,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT JOHN DOE IN OPPOSITION

EVERETT H. MECHEM
(Counsel of Record)
Attorney for Respondent
John Doe

Of Counsel:

WILSON, WORLEY, GAMBLE & WARD, P.C.
ATTORNEYS AT LAW
Fourth Floor, Heritage Federal Building
110 East Center Street
P.O. Box 1007
Kingsport, Tennessee 37662-1007
(615) 246-8181

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 92-78

In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioners,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT JOHN DOE IN OPPOSITION

Respondent John Doe respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, reported at 956 F.2d 545. The majority of facts in this matter were disputed, though this was ignored in Petitioners' Brief. As a result, Petitioners' statements of facts are incorrect, misleading and deal with matters not relevant to this case, necessitating a restatement of the pertinent facts considered below.

Statement of the Case

This is a civil rights action based on 42 U.S.C. §1983 in which John Doe alleges violations of his Eighth Amendment and Fourteenth Amendment rights. John Doe's claims arise from his incarceration in the Sullivan County, Tennessee Jail in September and October 1986. John Doe seeks recovery from Petitioners for his being harassed, assaulted, sexually assaulted and raped by fellow inmates while in the Sullivan County Jail. Following four days of testimony, the jury returned a verdict for John Doe in the amount of $100,000.00. The trial court did not disturb the verdict. Petitioners appealed. The Court of Appeals reversed and remanded based solely on an insufficient Fourteenth Amendment procedural due process charge. In its reversal, the Court of Appeals held the jury charge for the Eighth Amendment was legally sufficient, and that the facts were sufficient for submission of this claim and the claim for the procedural due process violation to the jury.

Summary of Argument

Petitioner obtained reversal of the jury's verdict. The decision below was in accord with the law applicable to inmates and prisoners under the Eighth and Fourteenth Amendments. No question of law justifies the grant of a writ of certiorari.

There was no classification of inmates in the jail in September 1986. Violent and non-violent inmates were

indiscriminately mixed.[1] Criminal histories were not investigated. There was a pervasive risk of harm to all inmates. John Doe was a member of an identifiable class of vulnerable inmates and was assaulted, sexually assaulted and raped in the jail. Not once did Petitioner have the forthrightness to write the word "rape" in his petition to this Honorable Court. Petitioner writes as though the word "rape" was not in the English language. Under the law of the State of Tennessee, Respondent was raped. This violent and degrading act was caused by Petitioners' wanton disregard for John Doe's safety, in violation of his rights under the Eighth and Fourteenth Amendments.

ISSUE PRESENTED TO THE JURY

The jury was asked only to decide whether Petitioners Sullivan County, Gardner or Hawkins created with deliberate indifference, by act or omission, a practice or custom with regard to classification (inmate safety) that proximately caused Respondent's rights under the Eighth Amendment of the United States Constitution to be violated and whether Petitioners arbitrarily deprived

[1] Petitioners' repeated references to Respondent as being "incorrectly classified" are simply irrelevant. Respondent's position has remained that neither he nor any of the other 140 some inmates in the jail in September 1986 were "classified." They simply were placed in an available bed, hopefully empty. Such random placing of violent and non-violent inmates throughout the jail is not a classification system. Petitioners attempt to imply that this is a case of a single misplaced inmate is misleading and does not reflect the issues involved.

Respondent of his rights under the Fourteenth Amendment (Vol. II, Tr. at 511-12).

FACTS

In September 1986, John Doe was nineteen years old, stood 6 feet, 1 inch tall, and weighed approximately 125 lbs. He has borderline mental faculties. It should have been obvious to all concerned at the Sullivan County Jail that John Doe was excessively vulnerable to inmate assault (Tr. 316-17). The inmates in Cell #3 had this impression with regard to John Doe. Inmate Tim Daniels said: "[John Doe] . . . and Tony [Bradley] . . . were the weak types" (Tr. 163). Inmate Kenny Copas said: "[John Doe] . . . is a small, weak-type and the others will pick on him" (Tr. 166). Inmate White (Mohammad) testified that he "sized" up [John Doe] . . . as "he came through the door" and he immediately saw that [John Doe] . . . "wasn't any trouble" (Tr. 120). Inmate Wilson said: "I felt sort of sorry for . . . [John Doe]. He is a weak-type and I don't think he belongs in jail" (Tr. 170).

A pervasive risk of harm existed at the jail.[2] Jailer Waterson told the jury he received complaints every day from inmates saying they were in danger and needed to be moved (Tr. 467). Inmate Cooke feared being assaulted in Cell #3. He stated that there were three or four fights

[2] The evidence showed that Cell #3 was one of the most violent cells in the Jail in September 1986. The evidence also showed the jail guards rarely responded to disturbances in the jail or inmate requests to be moved for their safety.

per day among the inmates at the jail (Tr. 107, 114). Inmates new to Cell #3 were greeted by a "welcoming committee". This committee would "size-up" an individual to see if there was "any fight in him" (Tr. 120). Antonio White said that fights among inmates were frequent, with numerous fights occurring most days (Tr. 122). Weapons were common in the jail (Tr. 343-44).

John Doe was in Cell #3 for approximately five (5) weeks in 1986. Several weeks prior to John Doe's being raped, Tyrone Ross assaulted Tony Bradley, also in Cell #3, with a homemade knife and tried to force him to perform oral sexual acts (Tr. 69, 76; Tr. 178). John Doe described the incident saying that Bradley "was just worried about his own survival" (Tr. 178). Ross repeatedly beat Bradley before and after John Doe was placed in Cell #3 (Tr. 69-70). Inmates Copas and Castle threatened John Cooke's life while the three were in Cell #3 (Tr. 109). Copas, Castle and other inmates in Cell #3 would cheer Ross on when he abused or harassed either Bradley or John Doe (Tr. 77). Prior to the rape, Ross was assisted by Daniels and Castle when they held John Doe and gave him a Mohawk hair cut against his will (Tr. 100-01). Later, Copas held John Doe while Ross sexually assaulted him (Tr. 107).

With regard to other incidents of abuse in September 1986, Inmate Cooke testified that Ross got in the shower with John Doe, John Doe "jumped back out of the shower", and Ross chased John Doe "with a toothbrush and his penis" (Tr. 104, 111). John Doe ran out of the shower and was "hollering for help", but none came (Tr. 114). Cooke saw Ross stick a toothbrush in "between" John Doe's "legs" from "the rear", and he saw Ross stick

his penis between John Doe's "legs from the rear" while John Doe was being held by other inmates in Cell #3 (Tr. 107). Bradley saw Ross rape John Doe with a toothbrush (Tr. 86). Later, Ross attempted to stick his "penis" in John Doe and John Doe screamed (Tr. 101).

Focusing on the Sullivan County Jail, Gordon Kampka (expert witness for Respondent) testified that a pervasive risk of harm existed for all inmates in September 1986 (Tr. 242-43). Kampka testified that the "serious incidents [at the jail] are not random or rare [and] . . . there is the regular pattern of occurrence that I frequently find, especially in severely overcrowded facilities" (Tr. 355).

"Non-violent" and "violent" male inmates were randomly placed throughout the jail depending on the availability of empty beds in September 1986 (Tr. 307). To demonstrate that the avowed classification practice resulted in a mixing of violent and non-violent inmates, Kampka reviewed the intake cards of those held in Cell #3 in September 1986. He found that these inmates' present offense or prior offenses included aggravated rape, aggravated assault and robbery, as well as those convicted of a misdemeanor such as John Doe (Tr. 418-19).

As presented in this case, the concept behind classification was promotion of inmate and staff safety by the reasoned placement of an inmate in a particular section of the jail based on whether the inmate was found to be a minimum, medium, or maximum security prisoner. Ex-Sheriff Gardner admitted that in September 1986 there was "no classification" system at the jail (Tr. 433). Jailer Ricky Waterson agreed, stating that there was no inmate

segregation. (Plaintiffs' Ex. 31, P. 18.) Jailer Waterson said, "We didn't have . . . [maximum, medium and minimum prisoners] sectioned" (Tr. 460).[3]

Under state statute Ex-Sheriff Mike Gardner was: "To take charge and custody of the jail of his county and of the prisoners therein . . . ", and "To perform such other duties as are . . . imposed by Law . . . ", T.C.A. §8-8-201(3) and (33); T.C.A. §41-4-101. Tennessee Code Annotated §41-4-410 states, "The Tennessee Corrections Institute [T.C.I.] has the power and its duty is to . . . establish minimum standards for local jails . . . " *Id.* The regulations promulgated by the T.C.I. require all local jails to implement written classification procedures for inmates. Sullivan County Sheriff Gardner drafted and professed to use such a policy, but later admitted the policies and procedures regarding classification in the jail's Policy and Procedure Manual were ignored. As a result, in a jail where a pervasive risk of harm existed, incoming inmates were randomly assigned to cells without regard to their prior institutional history, prior criminal history, present crime or vulnerability to inmate assault. (Tr. 433, 460, 861).

Hawkins, the Jail Administrator, said it would be "foolish" to ignore existing jail records prior to placement of incoming inmates (Tr. 841). He admitted that the Policy and Procedure Manual for the Sullivan County Jail directed him and his sergeants to review jail records before classifying inmates. Despite this, jail records were never reviewed. Upon release, each inmate's jail card, the

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[3] For a similar case involving the issue of classification and cell assignment for inmate safety see *Vosburg v. Salem,* 845 F.2d 763 (8th Cir. 1988) cert. denied 488 U.S. 928.

jail's only individual document concerning that inmate, was placed in storage (Tr. 861, 862).

The prior jail cards were stored in the same building in which Respondent was raped. The information the cards contained was never sought by Petitioners or their staff even though the Jail's Policy and Procedure Manual stated that the "jail administrator, chief jailer, or booking officer *will* review the admission's records and any existing facility records concerning 'incoming inmates' prior to classification." (Plaintiff's Ex. 8, Sullivan County Jail Policy and Procedure Manual, P. 114-15).

John Doe was abused, harassed, assaulted and raped by inmates with criminal histories which included assault and battery, assault, aggravated assault, statutory rape and aggravated rape (Tr. 418-19). Ross, the inmate who raped John Doe, has a history of institutional violence and he was returned to the Sullivan County Jail in August 1986 in part, for threatening to kill his girlfriend (Plaintiff's Ex. 28; Tr. 311). Less than six months prior to John Doe's rape, Ross was involved in two fights in two different cells in less than one hour in the Sullivan County Jail (Plaintiff's Ex. 1-A, Jail Log, April 7, 1986; Tr. 228). The Jail's Policy and Procedure Manual directs the jail staff to create "incident reports" for fights or altercations between inmates. The manual even provides a "Stock Incident Report", yet no incident reports were ever created by the jail staff prior to John Doe's being raped or any other assault within the jail – not one (Tr. 830). Without creating incident reports, the jail staff had no individual documentation with regard to Ross's history of prior institutional violence – an acknowledged indication of an inmate's propensity to be violent, and

thus, the need to be identified as "violent" for purposes of classification and placement in the jail. (Plaintiff's Ex. 8, Sullivan County Jail Policy and Procedure Manual, P. 115).

From March 1, 1976 through September 24, 1986, Sullivan County, Gardner and Hawkins were sent bi-annual reports based on inspections by the Tennessee Corrections Institute. These approximately twenty reports received by Petitioners informed them that the jail was overcrowded, that the individual cells in the Sullivan County Jail were inadequately lit, that fourteen day medical examinations were not done, and that the jail had no written classification plan (Tr. 224-27, 233-34; Plaintiff's Ex. 14). These reports were reviewed by Kampka who then testified that they indicated that the Defendants knew or should have known that the jail was overcrowded and that there was either no classification system or one that was non-functional (Tr. 361). Respondent's position at trial was that his mental disability was readily apparent; Petitioners disagreed. Even if Petitioners' position is assumed correct, they were required by their own policies and T.C.I. regulations to have a medical screening performed on all inmates within fourteen days of placement in the jail. Had this been done, Respondent's disability (vulnerability) would have been discovered by a competent physician during the health screening no later than ten days before the rape (Tr. 598-601).

With regard to his knowledge of inmate classification then Sheriff Gardner stated, "You could tell the classification was being done properly because my office was right in the middle of the jail" (Tr. 800-801). Sheriff Gardner

testified that Hawkins, the Jail Administrator, was responsible for ensuring there was proper classification of inmates (Tr. 803-04). Hawkins testified he had no involvement whatsoever with classification in September 1986. (Plaintiff's Ex. 33, at P. 10-11, 51.) Gardner later admitted there was no "classification" of inmates in September 1986 (Tr. 433).

Reasons for Denying the Petition for a Writ of Certiorari

I. PETITIONER WAS SUCCESSFUL IN THE COURT OF APPEALS IN OBTAINING A REVERSAL AND REMAND AND THE PETITION FOR CERTIORARI RAISES NO ISSUES OF IMPORTANCE WARRANTING THIS COURT'S IMMEDIATE CONSIDERATION.

Petitioner was successful in reversing the trial court's decision and the Court of Appeals remanded for further proceedings consistent with its decision. (Petition, App. 1-33.) The Court of Appeals found the jury charge for the Eighth Amendment to be appropriate and that the facts supported submission of that issue to the jury. This is consistent with the decisions of this Court and all the circuits that have decided this issue. *Whitley v. Albers*, 475 U.S. 312 (1986); *Roland v. Johnson*, 856 F.2d 764 (6th Cir. 1988). However, the Court of Appeals adopted Petitioners' argument with regard to the Fourteenth Amendment procedural due process jury charge finding it was inadequate. *E.g. Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990). Nothing in the Court of Appeals' decision warrants review by this Court.

II. QUESTIONS I, IA, IB, IC AND ID, PRESENTED IN THE PETITION FOR CERTIORARI WERE NOT RAISED, PASSED ON, OR PRESERVED IN THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

The Court would be required to render an impermissible advisory opinion should it undertake to answer questions I, IA, IB, IC or ID as listed in the Petition. *United Public Works v. Mitchell,* 330 U.S. 75, 89 (1947). Each of these questions deal with the Fourteenth Amendment. Petitioners did not present or argue the facts at trial relating to the procedural due process used or procedures available. Respondent felt it was factually clear that simply no procedural due process was given him. Petitioners were given the relief they sought, but now ask this Court to rule on a new issue at this level. The issues urged on this Court were not ruled on below and should not now be considered. *Springfield v. Kibbe,* 480 U.S. 257 (1987); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *California v. Taylor,* 353 U.S. 553, 556, n.2 (1957).

A. The Court of Appeals reversed the lower court but gave no specific instructions regarding the language for the jury charges to be used by the trial court.

The Court of Appeals did not instruct the trial court as to specific language it should use in charging the jury. The Court of Appeals in no way indicated that Petitioners were automatically liable for Respondent being raped. Liability, if automatic, stems from the undisputed fact that the sheriff of Sullivan County admitted at trial and in the local media that the Sullivan County Jail had no

classification system. How can Petitioners complain about a jury charge that has yet to be written? The trial court's charge regarding the Fourteenth Amendment was found to be inadequate and the Court of Appeals instructed the trial court to correct any and all deficiencies, as Petitioners' requested on appeal.

Gardner was "To take charge and custody of the jail of his county and of the prisoners therein . . . ", and "To perform such other duties as are . . . imposed by Law . . . ". T.C.A. §8-8-201(3) and (33); T.C.A. §41-4-101. Tennessee Case Annotated §41-4-410 states, "The Tennessee Corrections Institute has the power and its duty is to . . . establish minimum standards for local jails . . . " *Id.* The regulations promulgated by the T.C.I. state that all local jails *would draft* and *implement* written classification procedures for inmates. As the highest and final policy making authority for the Sullivan County Jail, ex-Sheriff Gardner was obligated by state law to establish the policies regarding inmate classification and placement at his jail. Sullivan County Sheriff Gardner drafted and professed to use such a policy.

The policy manual and the mandatory language contained therein regarding inmate classification was ignored, with inmates being randomly placed in beds as they became available. No reason was given by Petitioners at trial or on appeal explaining why the mandatory language in the Policy Manual was ignored. This was an arbitrary deprivation of Respondent's procedural due process rights.

B. The Court of Appeals found that the jury was not properly instructed on the issue of violation of procedural due process under the Fourteenth Amendment and remanded the case for rehearing.

All issues concerning the Fourteenth Amendment and procedural due process are to be reconsidered by the trial court on remand.

It is well established that to avoid ruling on hypothetical questions the trial court and the Court of Appeals should be given the opportunity to pass upon a legal issue before being reviewed by the United States Supreme Court. The issues raised by Petitioner are not of such importance that this traditional doctrine should be ignored.

III. THE ISSUE RAISED IN QUESTION IIB PRESENTED IN THE PETITION FOR CERTIORARI DEALS WITH THE EIGHTH AMENDMENT AND WAS NOT RAISED, PASSED ON, OR PRESERVED BY THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

The Court of Appeals was not asked to rule upon what specific evidence was admissible before the jury so it could determine whether there was a pervasive risk of harm when John Doe was raped, or what evidence was admissible to establish that John Doe was a member of a class of inmates vulnerable to attack. These issues were not raised at trial and are waived. *Wainwright v. Sykes*, 433 U.S. 72, 91 fn.14 (1977).) Nor did the Petitioners raise this issue at the Court of Appeals.

Moreover, the relevance of statements by former inmates that they were "afraid" must not be taken out of context, and the weight to be accorded that testimony, as with all other testimony, is within the province of the jury. The same is true for testimony from jail guards that inmates asked to be moved "every day" because they were in danger, testimony from inmates that they received death threats, testimony from inmates that they were constantly harassed, beaten and sexually assaulted while in Cell #3 at the Sullivan County Jail in August and September 1986.[4]

The jury was given the opportunity, as it should have been, to observe John Doe and to consider both jailers' and inmates' impressions with regard to John Doe's limitations to determine whether it should have been obvious to the jailers that he was a special problem inmate in terms of being vulnerable to inmate assaults.

IV. QUESTION ID PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN ABSTRACT ISSUE REGARDING THE FOURTEENTH AMENDMENT AND IS DEPENDENT ON ASSUMED FACTS NOT ESTABLISHED IN THE TRIAL COURT.

Petitioners offered no evidence regarding the types of hearings that might have been available to John Doe with

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[4] Respondent adopts the holding of the Court of Appeals that *The City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (Per Curiam) is inapplicable to the claims brought against Petitioners (Petition, App. 15-18.)

regard to his placement in Cell #3 in 1986 or with regard to hearings following his placement in Cell #3 in September of 1986. Neither the trial court nor the Court of Appeals made legal determinations or applied the law concerning procedural due process to the facts of this case, or specifically determined whether Petitioners' acts were random and unauthorized. This Court's rendering of a decision on these fact specific issues at this stage would constitute an inappropriate advisory opinion.

V. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WITH REGARD TO FEDERAL LAW.

This case presents no important unanswered questions of federal law and basically involves the resolution of disputed facts. The jury found the facts against Petitioners and the Court of Appeals reversed and remanded. The majority of the facts in this case remain disputed, making resolution of any issue presented by Petitioners difficult at best.

The allegations that confusion and conflict exist among the circuits with regard to the Eighth Amendment or the Fourteenth Amendment is simply untrue. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Whitley v. Albers*, 475 U.S. 312 (1986); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Roland v. Johnson*, 856 F.2d 764, 769 (6th Cir. 1988).

The cases cited in the Petition on p. 23 certainly reveal no confusion among the circuits regarding the Eighth Amendment. While the outcomes may vary, the legal standards applied are the same. In *Apodaca v. Rio Arriba County Sheriff's Department*, 905 F.2d 1445 (10th Cir. 1990), the court dealt with the Fourth Amendment, but

imposed an intent requirement for finding liability. In *Williams v. Borough of West Chester,* 891 F.2d 458 (3rd Cir. 1990), the court held that a municipality may be liable only if it acted with deliberate indifference to the consequences of a policy that caused plaintiff's harm. *Williams, supra,* 891 F.2d at 467 fn 14. In *Partridge v. Two Unknown Police Officers of Houston,* 791 F.2d 1182 (5th Cir. 1986), the court held that plaintiff must establish evidence of callous or deliberate indifferences toward the rights of detainees known to be prone to suicide or dangerous to others in order to recover. In *Wilkes v. Young,* 897 F.2d 896 (7th Cir. 1990), the court held under the Eighth Amendment a prison official will be liable only if the challenged conduct exhibits a conscious disregard for an inmate's rights. In *Redman v. County of San Diego,* 896 F.2d 362 (9th Cir. 1990), the court held that to recover an inmate must show defendants were deliberately indifferent to a substantial risk of harm to prove an Eighth Amendment violation. In *Vosburg v. Salem,* 845 F.2d 763 (8th Cir. 1988), deliberate indifference was required – and found – where there was *no* policy for separating violent and non-violent inmates based at least on prior criminal history or institutional behavior.

A. The Eighth Amendment does not preclude claims under the Fourteenth Amendment involving state created liberty interests.

The due process provisions of the Fourteenth Amendment provide protected liberty interests to prisoners in two ways. *Hewitt v. Helms,* 459 U.S. 460 (1983). One is the general concept of liberty interest flowing from the Fourteenth Amendment itself. The second flows from

state related liberty interests created by procedures, statutes, regulations, or other material which limits the discretion of state officials. No case has been cited by Petitioner, and respondent can find none, where any court has found that the Eighth Amendment precludes an inmate's claims for relief under the procedural due process clause of the Fourteenth Amendment for state related or created liberty interests.

The Tennessee Corrections Institute (T.C.I.) has issued minimum regulations for the operation of county jails. These regulations require the sheriff, as a state official, to create written classification procedures for the safe keeping of inmates in county jails. In Tennessee, the sheriff, by act of the state legislature, is the official solely responsible for the keeping of prisoners in county jails. T.C.A. §41-4-101. Respondent Sullivan County and then Sheriff Gardner issued the Policy and Procedure Manual for the Sullivan County Jail which contained the explicit provisions regarding classification cited by the Court of Appeals in its opinion. *John Doe v. Sullivan County,* 956 F.2d at 557 n. 4 (6th Cir. 1992); *see also Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 460 (1989); *Walker v. Norris,* 917 F.2d 1449 (6th Cir. 1990); *Martucci v. Johnson,* 944 F.2d 291, 294 (6th Cir. 1991), *quoting, Wolff v. McDonnell,* 418 U.S. 539 (1974). The mandatory language in the Policy and Procedure Manual creates a protected liberty interest under the Fourteenth Amendment and as found by the trial court and the Court of Appeals, Respondent pled and presented sufficient facts to implicate the procedural due process protections of the Fourteenth Amendment.

The Court should not consider this issue because the relationship between the Eighth and Fourteenth Amendment was set forth in *Whitley v. Albers*, 475 U.S. 312 (1986). In the context of "prison security" in an emergency situation this Court found the Eighth Amendment "serves as the primary source of protection" regarding claims of excessive force. *Whitley*, 475 U.S. at 326. *Whitley* did not involve a procedural due process claim. *Id.*

This is not a case involving an emergency situation arising from a prison riot. In this case, Petitioners had nearly a month to deliberate on John Doe's classification and make a decision regarding pre-deprivation hearings, not seconds during a prison riot as in *Whitley, supra.* Petitioners have not developed at any level the facts, law and arguments to allow this Court to properly address the relationship between the Eighth Amendment and Procedural Due Process. Upon remand Petitioners will have that opportunity.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

EVERETT H. MECHEM
(Counsel of Record)
Attorney for Respondent
John Doe

Of Counsel:

WILSON, WORLEY, GAMBLE & WARD, P.C.
ATTORNEYS AT LAW
Fourth Floor, Heritage Federal Building
110 East Center Street
P.O. Box 1007
Kingsport, Tennessee 37662-1007
(615) 246-8181

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In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioners,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITIONERS' REPLY BRIEF

CHARLTON R. DEVAULT, JR.
Counsel of Record
102 Broad Street
Kingsport, TN 37660
(615) 246-3601

JOHN S. MCLELLAN, III
P.O. Box 509
Blountville, TN 37617
(615) 323-6481

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY TO POINTS RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

The plaintiff/respondent's Brief in Opposition[1] seeks to reargue his miscellaneous "jail conditions" claims which were dismissed by the District Court. The Sixth Circuit Court of Appeals affirmed that the plaintiff's county jail "systemic deficiencies" claims were irrelevant to the legal issues material to his 42 *U.S.C. § 1983* case and to his claim he was attacked with a toothbrush during his incarceration [App. 5 - 7][2].

The plaintiff's reliance on the colorful and conflicting testimony of various former jail inmates is also irrelevant to the critical legal issues raised in the Petition for Writ of Certiorari. There is no proof in the record that the Sullivan County or its jail policy-makers, Sheriff Gardner or Captain Lynn Hawkins, had knowledge of any of the alleged incidents described by the various disgruntled former jail inmates who testified for the plaintiff. The inmate witnesses could not testify that they had told any particular jailer of the alleged events which they described at the trial of the case.

The plaintiff has referred to the testimony of one of his witnesses, El Rasheed Hogg Muhammad, formerly known as Antonio White, in support of his contention that the Sullivan County Jail was a violent place and therefore this Honorable Court should not grant a writ of certiorari. While the defendants insist the testimony of

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[1] As in the Petition for Writ of Certiorari, the respondent John Doe will be referred to as "plaintiff." The petitioners will be referred to as "defendants."

[2] References to "App." are to the pages of the appendix bound and filed with the Petition for Writ of Certiorari.

former jail inmates has no bearing on the significant legal issues involved in the Sixth Circuit's opinion or in the Petition for Writ of Certiorari, the defendants refer to that portion of Muhammad's testimony which contradicts the claim made by the plaintiff in his Brief in Opposition that cellblock #3 was the center of "pervasive" inmate violence:

> Q. All right. What was cell block 3 in Sullivan County like in September of '86 other than what you've already told us about it being dirty?
>
> A. Excuse me. Just a routine daily, just lay around, read books, play cards, whatever.
>
> Q. Were there fights in cell 3?
>
> A. No.
>
> [Muhammad, Tr. 121, direct examination]
>
> * * *
>
> Q. Now, what about Tracy's hair, did you ever observe anything concerning Tyronne Ross or Kenny Copas or other inmates Tracy's hair?
>
> A. Yes, I did.
>
> Q. What did you see happen to Tracy's hair?
>
> A. I seen him get a Mohawk hair cut?
>
> Q. Was that at his request?
>
> A. At Tracy's request.
>
> Q. At Tracy's request.
>
> A. At Tracy's request.
>
> [Muhammad, Tr. 127, 128, direct examination]
>
> * * *

Q. I apologize. Mr. Muhammad, was there a time at the Sullivan County Jail when you saw Tyronne Ross do anything with his male sex organ?

A. Other than shaking it and pointing it at various individuals, that's about it.

Q. So you're saying you did see that?

A. Yeah.

Q. And was one of the individuals that he shook and pointed his sex organ at Tracy?

A. Yes, it was.

Q. And did you tell anybody about that?

A. No, because it really wasn't nothing out of the ordinary.

[Muhammad, Tr. 130, direct examination]

* * *

Q. Approximately how many other individuals were in cell block 3?

A. I'd say eleven at one time.[3]

Q. Now, Ms. White has asked you about the general conditions of the jail. How many of

---

[3] Each of the county jail's twelve-men cellblocks was fitted with three sleeping areas or "slams," each with four bunk beds and a toilet and separated from each other by iron bars. The "slams," arranged in a row against a concrete wall, each opened into a larger "day area" containing benches, tables, and shower facilities. Each cellblock was separated from the other similarly constructed cellblocks on either side by a concrete wall. Jailers could observe the day area and "slams" through the bars which formed the wall on one end of the cellblock. The opposite wall held a locked steel door which opened into the jail's hallway and allowed guards and inmates to enter or leave the cellblock's day area.

the cell blocks were you a prisoner in during this time of incarceration in '86 and early '87?

A. I stayed in cell 3 the entire time.

Q. And how did cell block 3 get along? Were there fights in cell block 3?

A. No.

Q. Were there any sexual assaults in cell block 3?

A. None to my knowledge.

Q. Were you ever sexually assaulted?

A. No.

Q. When you made reference to the welcoming committee that you discussed here with Ms. White, you stated that you saw that Tracy here was no major threat to anyone in the cell block, is that correct?

A. That's correct.

Q. Was there any individual in that cell block that posed a threat to the other inmates?

A. No, Sir. We would have got rid of him.

Q. How would you characterized cell block 3 as compared with the other cell blocks in the jail, was it a quiet cell block, was it a noisy cell block?

A. Very quiet. Everyone got along together. You didn't have to worry about hiding your money or anything like that.

Q. Now, you mentioned that you had a weapon in the – in your slam area. Did you hide that from the guards when they came in and searched?

A. When they ever did come in.

Q. What kind of weapon was it?

A. It was a knife.

Q. Did you ever use it on anybody?

A. No, Sir, I never had.

Q. Did anybody use a weapon on anybody else in cell block 3 while you were there?

A. No, Sir.

[Muhammad, Tr. 132-134, cross-examination]

Despite the plaintiff's claims of "misclassification" of cellblock #3 inmates, Tyronne Ross, the inmate who stuck a toothbrush partially into the plaintiff's anus on one occasion, was not incarcerated for any crime of sexual violence.[4] None of the Tennessee Corrections Institute reports referred to by the plaintiff mentioned any problem with inmate violence at the jail. The earlier class action "jail conditions" case in which the plaintiff's trial attorney, Ms. Penny White, represented inmates seeking to improve the living conditions at the county jail during 1984-1986, and in which Gordon Kampka, the plaintiff's expert witness also testified, did not involve any allegations or findings of pervasive inmate violence. Tyronne

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[4] The plaintiff prefers to categorize the incident a "rape." The evidence showed that there had been only one reported rape in the jail's cellblocks in the eight or so years preceding the plaintiff's assault and there had been no rapes at all during Captain Lynn Hawkins' tenure as jail administrator. There was certainly no contemporaneous pattern of perverted sexual activity in the jail to put the defendant policy-makers on notice that any particular jail inmate was in imminent danger of being molested.

Ross', mischaracterized probation revocation reports which were relied upon by the plaintiff at trial were not part of the jail records and were never seen by the defendants during the plaintiff's incarceration. But the plaintiff's rehashing of evidence which was introduced in his case in chief against all of the various defendants and in support of his "systemic deficiencies" theories misses the point of the Petition for Writ of Certiorari.

When the District Court concluded that the individual defendant jailers had no reason to suspect that the plaintiff was in danger of being assaulted and directed verdicts in their favor [App. 44], and when the Sixth Circuit confirmed the directed verdicts [App. 7 - 9], the defendants, as county jail policy-makers, should have been legally absolved of any liability for the plaintiff's 42 *U.S.C. § 1983* claims. By refusing to require the District Court to enter a judgment notwithstanding the verdict, now a judgment as a matter of law, in favor of Sullivan County and its defendant Sheriff and defendant jail captain, the Sixth Circuit became the first and only circuit court of appeals to refuse to follow the mandate of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). If the relevant evidence, including the colorful but contradictory accounts of cellblock life given by former inmates, was not sufficient to put the individual defendant jailers on notice that the plaintiff was in danger of being assaulted, sexually or otherwise, then, as a matter of law, the defendant policy-makers could not be found to have been deliberately indifferent to an unconstitutional situation or to have promulgated any policy or custom which violated the plaintiff's Eighth Amendment rights. The Court of Appeals' reference to the "good faith immunity defense" which was never mentioned by the District Court as a

reason for granting the jailers' motions for directed verdicts, is a feigned distinction utilized to avoid the application of *Heller*.

The plaintiff is less than candid in his discussion at Section II and III of his "Reasons for Denying the Petition for a Writ of Certiorari." The defendants did object to the District Court's Fourteenth Amendment charge and did offer an alternative charge which paralleled the deliberate indifference requirements of their proffered Eighth Amendment charge. The plaintiff's claims for relief as embodied in the District Court's final pretrial order [App. 38 - 39] did not include a procedural due process claim and the plaintiff did not request a procedural due process jury instruction. The District Court directed that all proffered, but unaccepted, jury charges be considered as objections to the Court's charge [Tr. 901-905]. In discussion with counsel, the Court expressly rejected the defendants' proposed Fourteenth Amendment charge.

Even though the plaintiff did not submit a Fourteenth Amendment procedural due process charge, the Court gave an instruction which the Sixth Circuit Court of Appeals held was a procedural due process charge. The Court of Appeals found the District Court's procedural due process charge had been "confusing," reversed the judgment in favor of the plaintiff, and directed the District Court to formulate a procedural due process jury instruction within specific parameters now objected to by the defendants in their Petition for Writ of Certiorari.

The defendants insist that the Sixth Circuit's interpretation of procedural due process is in direct conflict with the decisions of this Court previously cited at pages

7 and 8 of their Petition for Writ of Certiorari. Those areas of conflict with established precedent sprang into existence when the Sixth Circuit published its opinion in this case and could only be criticized thereafter. If the Court of Appeals' decision approving the creation of various liberty interests by local government operational manuals were to remain the law, a proliferation of inconsistent, unnecessary, and unmanageable Fourteenth Amendment liberty interest claims will explode in the circuits. The Sixth Circuit's initiation and approval of the practice of allowing federal court juries to second guess jail booking officers' decisions regarding inmate classification for cellblock assignment purposes under any theory of procedural due process is similarly unacceptable and unworkable. A court, not a jury, should decide what type of procedural due process hearing the Fourteenth Amendment requires in any particular situation. The Sixth Circuit's opinion is an unacceptable liberalization and expansion of the liberty interest and procedural due process components of the Fourteenth Amendment.

The defendants' clear position, in the District Court and before the Sixth Circuit, has always been that the Eighth Amendment controls the disposition of the plaintiff's *§ 1983* claims for damages he allegedly sustained as a result of the toothbrush incident during his incarceration in cellblock #3 [Tr. 900-902]. Fourteenth Amendment procedural due process considerations should be either non-existent or irrelevant to the plaintiff's claims.

Contrary to the plaintiff's response in Section III, p. 13, of his brief, the defendants' are not arguing the inadmissability of evidence. This case was initially tried on various 42 *U.S.C. § 1983* theories under which the District Court allowed every type of evidence available to the

plaintiff to be put into the record. At the close of the plaintiff's proof, the Court dismissed the plaintiff's "jail conditions" case and directed verdicts in favor of numerous defendants, including the individual jailers who had exercised the daily "hands-on" custody of the plaintiff. The County, the sheriff, and the jail captain objected to the court's jury instructions regarding the plaintiff's Eighth Amendment claims against them and did bring these objections to the attention of the Sixth Circuit Court of Appeals. The appellate court recharacterized the defendants' objections when it referred to them in its opinion at App. 20. All of the defendants' references to the evidentiary record on the Eighth Amendment issues are intended to emphasize the error in the jury instructions and to highlight the importance of the lower courts' complying with the mandate of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) which requires the dismissal of the plaintiff's Eighth Amendment claims against the defendant policy-makers when the individual deputies who had direct control and custody of the plaintiff did not violate his Eighth Amendment rights.

The plaintiff's insistence at page 14 of his opposition brief that the physical appearance of the plaintiff was critical to the defendants' liability as policy-makers only emphasizes the significance of the lower courts' departure from *Heller, supra*. As the defendants emphasized in their appellants' brief to the Sixth Circuit – the defendant policy-makers did not personally know the plaintiff and never saw him. The jailers who did see the plaintiff every day and who allegedly should have been aware of the plaintiff's "obvious" disability were expressly found not to have been aware of any circumstances which should

have caused them to believe that the plaintiff was in danger of being assaulted in cellblock #3 [App. 44].

The facts relevant to a determination of the important legal issues involved in the defendants' petition for a writ of certiorari are not in dispute.

CONCLUSION

The Writ of Certiorari to the Sixth Circuit Court of Appeals prayed for by the defendants Sullivan County, Sheriff Mike Gardner, and Captain Lynn Hawkins should be granted.

Respectfully submitted,

CHARLTON R. DEVAULT, JR.
Counsel of Record
102 Broad Street
Kingsport, TN 37660
(615) 246-3601

JOHN S. MCLELLAN, III
P.O. Box 509
Blountville, TN 37617
(615) 323-6481

Attorneys for Petitioners